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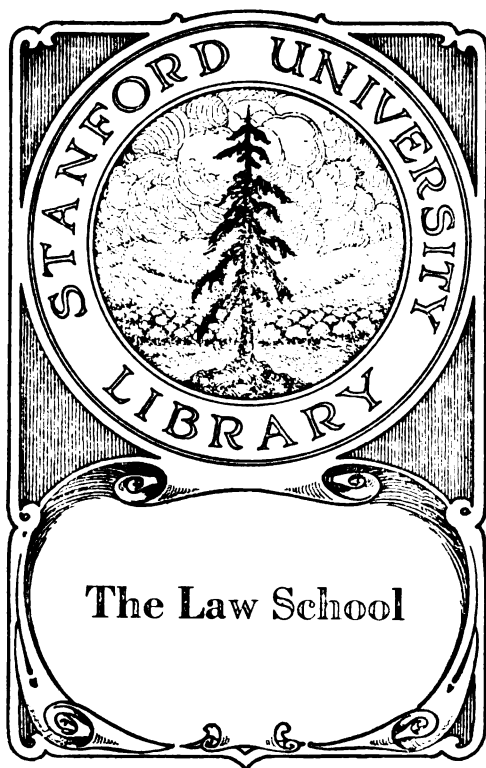
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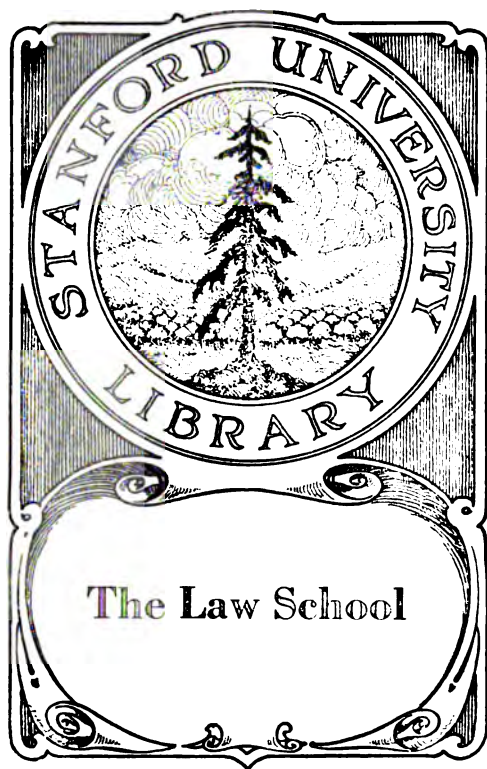
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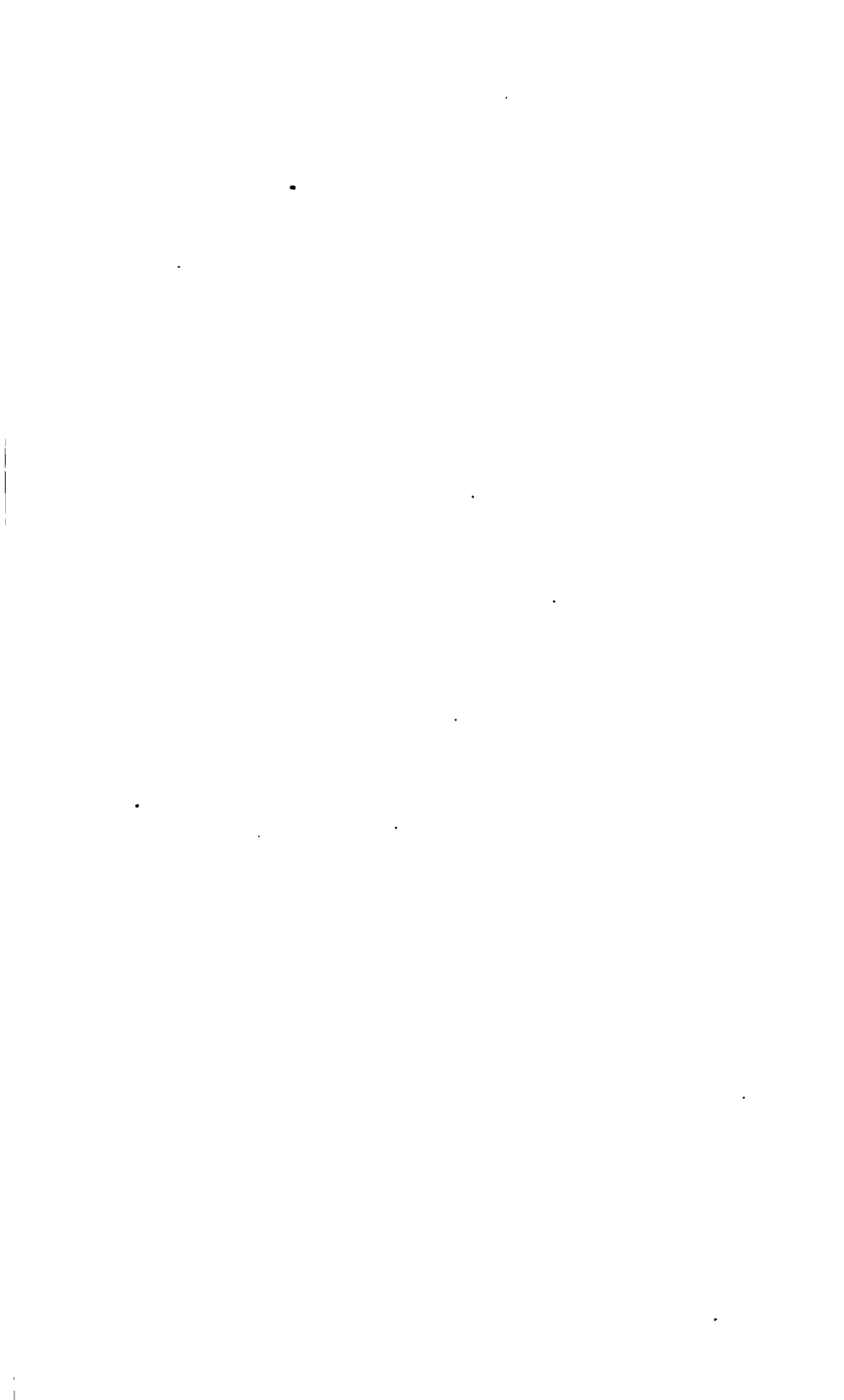
HANDBOOK  
OF THE  
LAW OF CONTRACTS

BY  
WM. L. CLARK

WEST PUBLISHING CO.,  
ST. PAUL, MINN.  
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## PREFACE.

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In preparing this work the object has been to present the general principles of the law of contract clearly and concisely, with proper explanations and illustrations,—not to make a digest. There has been no attempt to be original for the mere sake of originality. Statements of rules have been freely taken from recognized authorities. So much use has been made of Sir William Anson's and Mr. Leake's works, that acknowledgment has not always been made in the notes. A general acknowledgment is therefore made here. Where matter has been obtained from other sources it has been duly acknowledged.

Nearly 10,000 cases have been cited. Every one of them has been personally examined, and is cited because in point,—not because it has been cited by some other writer, or in some other case, or because it is found in the digests. A few cases have been cited for their valuable dicta, or because they collect and discuss the cases, but in most instances the cited case will be found to embody an actual decision directly in point. Where a number of decisions have been cited to the same point, the leading cases and those best illustrative of the principle involved have been cited first.

St. Paul, Minn., November 15th, 1894.

LAW CONT.

(iii)\*

W. L. C., Jr.

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# HAND-BOOK

OF THE

CON-

# LAW OF CONTRACTS.

## CHAPTER I.

### DEFINITION, NATURE, AND REQUISITES OF CONTRACT IN GENERAL.

- 1-2 Contract Defined.
3. Agreement.
4. Obligation.
5. Concurrence of Agreement and Obligation.
6. Promise.
- 7-9. "Void," "Voidable," and "Unenforceable" Agreements.
10. Essentials of Contract.

### CONTRACT DEFINED—BROADEST SENSE.

1. A contract, in its broadest sense, is an agreement whereby one or more of the parties acquires a right, in rem or in personam, in relation to some person, thing, act, or forbearance. It may be, in its inception:

- (a) Executory; that is, where an obligation is assumed by one or both parties to do or forbear from doing some act. The rights acquired are rights in personam.
- (b) Executed; that is, where everything is done at the time of agreement, and no obligation is assumed, as in the case of a conveyance of land without covenants, or a sale and immediate delivery of goods for cash and without warranty.\* Executed.

\* The propriety of calling such an agreement a contract has been questioned. Post, p. 12, note.

contracts when fully performed are also be executed.

Section  
298.

### SAME—PROPER SENSE.

299  
300 A contract in its narrower, and more proper, sense is an executory contract. It is the result of the concurrence of agreement and obligation, and may be defined as an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.<sup>1</sup>

**EXCEPTIONS**—There are two classes of obligation which are commonly called contract, but which are more properly called quasi contract, being created by law without agreement, and even against the will of the person bound. These are:

- (a) So-called contracts of record consisting of judgments of a court entered otherwise than by consent.

<sup>1</sup> The following are some of the definitions given in the books:

"An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." Anson, Cont. 9.

"Every agreement and promise enforceable by law is a contract." Pol. Cont. 1.

"An agreement, upon sufficient consideration, to do or not to do a particular thing." Bl. Comm. 442; 2 Kent, Comm. 449.

"An agreement between two or more parties for the doing or the not doing of some particular thing." 1 Pars. Cont. 6.

"A contract or agreement not under seal may be defined to be an engagement entered into between two or more persons, whereby, in consideration of something done or to be done by the party or parties on one side, the party or parties on the other promise to do or omit to do some act." Chit. Cont. 7.

"A contract is a promise from one or more persons to another or others, either made in fact or created by law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration, or being executed, and not being in a form forbidden or declared inadequate by law." Blsh. Cont. § 22.

- (b) Obligations created by law to do justice between parties, one of whom has paid or received something which the other ought to have paid or received.

When we speak of contracts we generally mean executory contracts, and it is of this kind of contract principally that this work is to treat. A contract in this sense results from the combination of the two ideas of "agreement" and "obligation." It is that form of agreement, or meeting of minds, which directly, and not remotely, contemplates and creates an obligation; and the contractual obligation is that form of obligation which springs directly from agreement. These features are present in all real contracts. They are the very foundation of contract as a legal conception. In reference to all real contracts it may be said that there must be legal agreement and legal obligation, and it may also be said without exception that whenever there is legal agreement contemplating and resulting directly in legal obligation there is contract. Those judgments of a court of record which are rendered against a party after litigation, and against his will, and which are termed contracts of record, and those obligations which, in the absence of any agreement at all, are imposed by the law for the purpose of justice, as, for instance, where a person has paid or received something which another person ought to have paid or received, are not really contracts at all. They are quasi-contract. By reason of a fictitious promise created by law, they have the semblance of contract. There is also an apparent exception to the requirement of agreement in cases where a person so acts as to lead the other to believe that he agrees, and to act on such belief, in which case the law will conclusively presume that he agreed, or say that he shall be estopped by his conduct from saying that he did not in fact agree. With the exception of the cases we have mentioned, every contract is the result of an agreement between the parties, made with the intention of creating, and in fact creating, an obligation. It is necessary, therefore, to clearly understand what is meant by the terms "agreement" and "obligation," and how they may or may not concur so as to create a contract.

It will be seen in the course of the discussion that there may be

agreement without the intention to directly create an obligation, and there may be an obligation not directly created by agreement, in which cases, except in the case of quasi contracts, there is no contract relation.

### AGREEMENT.

**3. Agreement is the expression by two or more persons, either by words or by conduct, of a common intention to affect the legal relations of those persons.<sup>1</sup> There must be a meeting of two minds in one and the same intention. To constitute agreement in law, therefore—**

- (a) At least two parties are necessary.
- (b) The intention must be distinct, and must be common to both parties; there must be neither doubt nor difference.
- (c) The intention must be expressed. This may be either by words or by conduct.
- (d) The intention must be communicated by each to the other.
- (e) The intention must refer to legal relations.
- (f) The consequences must affect the parties themselves.

From the very nature of agreement the most essential element is the consent of the parties. There must be a meeting of two minds in one and the same intention. In the absence of this element there can be no agreement, and, therefore, no contract. It is of the utmost importance that the student should clearly understand what is meant

<sup>1</sup> See Anson, Cont. 3. "(1) An agreement is an act in the law, whereby two or more persons declare their consent as to any act or thing to be done or forbore by some or one of those persons for the use of the others or other of them. (2) Such declaration may consist of (a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or (b) a proposal made by some or one of them, and accepted by the others or other of them." Pol. Cont. 1.

by agreement as a legal conception, and that he should know its essential elements; for in all cases, with the exceptions mentioned, if one of these elements is lacking, there can be no contract. He should start out, then, with the proposition that to constitute contract there must be agreement, and agreement which the law can recognize; and must bear in mind the requisites of such an agreement.

### *Two Parties Necessary.*

In the first place, it is manifest that at least two parties are necessary. There may be more than two, but there cannot be less. It is therefore impossible for a man to make an agreement or contract with himself.\*

### *Distinct Common Intention.*

It is also essential that there shall be a distinct intention, and an intention which is common to both parties. If there is doubt or difference, there is no meeting of minds, and hence no agreement. If a person, when asked whether he will do a certain thing, says, "Very possibly," there is doubt, and no agreement is reached; and if he says he will do something else, there is a difference, and therefore no agreement. From the very nature of agreement there can be neither doubt nor difference.

### *Expression of Intention.*

The state of mind or intention of a person, being impalpable, can be ascertained only by means of outward expressions, such as words and acts. Accordingly, the law judges of the state of mind or intention of a person by outward expressions only, and excludes all questions concerning intentions unexpressed. It imputes to a person a state of mind or intention corresponding to the rational and honest meaning, not only of his words, but of his actions as well; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to agree in regard to some matter, that agreement is established in law as a fact, whatever may be the real but unexpressed state of his mind on the mat-

\*Another reason why a man cannot enter into a contract with himself is because he cannot be under a legal obligation to himself. This will be presently explained. Post, p. 9.



ter.<sup>4</sup> In judging of intention from a person's words and conduct, where his acts are inconsistent with his words, the former are, in general, accepted as the more reliable guide to the intention; and the conduct may in some cases determine the intention, even in opposition to the words.<sup>4</sup>

*Same—The Term "Implied Contract."*

The term "implied contract" is frequently used in the text-books and in the decisions and opinions of the judges, and it will be well to explain at the outset what is meant by the term. It is used in two senses:

(1) As we have stated, quasi contracts are a class of obligations which are implied or created by law without any agreement whatever between the parties. Where, for instance, one person has paid out money which another person ought to have paid, the law implies a contract on the part of the latter to repay him. Such is also the case where one person has received something which another ought to have received; the law implies a contract on his part to make good to the latter the benefit to which he is so entitled. These are not true contracts. They are implied or created by law without any agreement or contract in fact, and even against the will of the person made liable. They are more properly called quasi contracts.

(2) There is another class of contracts often termed "implied," in which agreement is an essential element. They differ in no respect from other contracts involving agreement, except in the evidence of the agreement. For instance, if a person takes goods from a store with the merchant's cognizance, it is said that there is an implied contract to pay for them. Nothing more is meant by this than that, in so taking the goods, he has by his conduct expressed an intention to pay for them. To say that the law from this implies a contract is to say no more than that his conduct proves his agreement to pay. The law does not create the contract as it does in case of quasi contracts. The contract is created by the parties themselves, and the law merely says that they have, by their conduct, expressed their intention. There is no difference, except in the evidence of the intention and agreement, between these contracts and a contract resulting where a man takes goods and exe-

<sup>4</sup> Leake, Cont. 8.

cutes a written promise to pay for them. The contract in the cases we have been explaining is implied as a matter of fact from the evidence, and not as a matter of law merely, as in case of quasi contracts.

#### *Communication of Intention.*

Agreement further imports that there shall be a mutual communication between the parties of their intentions to agree, for without this neither could know the state of the other's mind. The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. Mere uncommunicated intention, though common to both parties, cannot constitute agreement. If a person asks another if he will do something, and the latter makes no reply, there is no agreement, even though he may intend to do it. A secret acceptance of a proposal cannot constitute agreement; nor, it is said, can agreement result where the intention of a party is communicated, not to the other party, but to a third person.<sup>6</sup>

#### *Reference to Legal Relations.*

An agreement, to be recognized as such by the law, so as to constitute a contract, must be "an act in the law;"<sup>7</sup> that is, it must be, on the face of the matter, capable of having legal effects; and therefore, the intention of the parties must refer to legal relations, so that the courts, which can only deal with legal relations, may

<sup>6</sup>Leake, Cont. 8. Intention may be communicated to the agent of a party, but this is equivalent to communication to the party himself. In *White v. Corlies*, 46 N. Y. 467, the defendants wrote plaintiff, "Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once." No reply to this note was ever made by the plaintiff, and on the next day it was countermanded; but before the countermand the plaintiff had begun performance by purchasing materials and beginning work. The court held that the note did not make an agreement; that it was a mere proposition, and must have been accepted by the plaintiff before either party was bound. "In the case in hand," it was said, "the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which in itself is no indication of an acceptance become such because accompanied by an unvinced mental determination."

<sup>7</sup>Pol. Cont. 2.

take cognizance of it. It must have reference to the assumption of legal rights and duties, as opposed to engagements of a social character and engagements of honor. If a person agrees to sell another a horse, the agreement refers to legal relations, and may result in contract; but, if a person agrees to go to another's house to dine, the intention refers merely to a social engagement, and no contract results. Legal consequences are not contemplated.<sup>8</sup>

*Consequences must Affect the Parties.*

In order that agreement may result in obligation, so as to constitute contract, the consequences of the agreement must affect the parties themselves; otherwise the verdict of a jury, which is an agreement between the jurors, would satisfy the requirements.<sup>9</sup>

<sup>8</sup> It has been said that we may accept as a test of this question that the intention must relate to something which is of some value in the eye of the law, something which can be assessed at a money value. Anson, Cont. 2. It is true that the matter of an agreement must be reducible to a money value, to be enforceable; but this necessity does not spring from the nature of agreement. See post, p. 11. Furthermore, there may be agreements which will meet this requirement, and yet will not result in contract, because of the intention of the parties; that is to say, because of failure to refer to legal relations. A man who invites another to dine with him, or perform any other social function, goes to expense in making preparations, and if the engagement is broken, there is a loss which may be assessed at a money value, but this does not make the agreement a contract. The reason is that the parties do not contemplate legal relations and consequences. The engagement is merely a social one. If a man should desire another's presence at dinner for business reasons, and the engagement should be made by both parties with this understanding, it would, no doubt, constitute a contract for a breach of which an action would lie. The question must be determined by the intention of the parties, as well as by the nature of the matter of the agreement. The fact that the matter contemplated is reducible to a money value does not make the agreement a contract, unless, in addition to this, the parties intend to affect their legal relations.

<sup>9</sup> If a fund is held by the trustees under a will, to be paid over to the testator's daughter on her marriage with their consent, and they give their consent to her marrying, this declaration of consent affects the duties of the trustees themselves, for it is one of the elements determining their duty to pay over the fund. Still it is not an agreement, for it concerns no duty to be performed by any one of the trustees to any other of them. There is a common duty to the beneficiary, but no mutual obligation. Pol. Cont. 3.

## OBLIGATION.

4. Obligation is a control exercisable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value." The essentials in detail are that—

- (a) At least two parties are necessary.
- (b) The parties must be definite.
- (c) The acts to be done or forborne must be definite.
- (d) The matter of the obligation must be reducible to a money value.

Obligation is a legal bond or tie whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group. Its characteristics will be briefly shown, and it should be remembered that, since there can be no contract without obligation, every element essential to the creation of an obligation is essential to the creation of a contract.

*Two Parties Necessary.*

From the very nature of things, two persons are necessary. There may be more than two, but there cannot be less. A man cannot be under a legal obligation to himself, or even to himself in conjunction with others. He may owe a natural or moral duty to himself, but a duty is not an obligation unless it is enforceable at law. A man cannot sue himself, and therefore cannot be under an obligation in law to himself. It follows, then that a man cannot enter into a contract with himself, or even with himself and others. In an English case, where a man had borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account, it was held that he could not be sued upon his covenant. "The covenant, to my mind, is senseless," said Pollock, C. B. "I do not know what is meant, in point of law, by a man paying him-

"Anson, Cont. 7. "By 'obligation' we mean the relation that exists between two persons, of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing." Pol. Cont. 3.

self.”<sup>11</sup> And in a Massachusetts case it was said that “it is a first principle that, in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself. He can in no form be both obligor and obligee.”<sup>12</sup>

*The Parties Must be Definite.*

The parties to an obligation must be definite, both those having the right to exercise control and those bound. A man cannot be under an obligation to the entire community. His liabilities to the political society of which he is a member are matters of public or criminal law. Nor can the whole community be under an obligation to him. The correlative right on his part would be a right in rem, and would constitute property, as opposed to obligation. Whether the right is to personal freedom or security, to character, or to those more material objects which we commonly call property, it imposes a corresponding duty on all to forbear from molesting the right. Such a right is a right in rem. It is of the essence of obligation that the liabilities imposed are imposed on definite persons, and are themselves definite. The rights which it creates are rights in personam.<sup>13</sup> There are apparent exceptions to this rule in the case of contracts made by and with cities and other municipal corporations and with the state. The state represents the public, and such is also the case with municipal corporations, but this fact does not prevent contracts with them. A municipal corporation or the state is a definite party, distinct from the members of the community.

*The Rights and Liabilities Must be Definite.*

To constitute an obligation enforceable in law, the rights and liabilities given and imposed must be definite. In other words, it must relate to definite acts and forbearances. The freedom of the person bound by an obligation is not curtailed generally, but is limited in reference to some particular act or series or class of acts. If the thing to be done or forborne is so indefinite or uncertain that the court cannot say what was agreed upon, it cannot enforce the agree-

<sup>11</sup> *Faulkner v. Lowe*, 2 Exch. 595.

<sup>12</sup> *Eastman v. Wright*, 6 Pick. (Mass.) 316. And see *Allin v. Shadburne*, 1 Dana, (Ky.) 68.

<sup>13</sup> *Anson*, Cont. 5.

ment. An agreement not enforceable creates no obligation, and therefore cannot result in contract.

*The Thing to be Done or Forborne must be Reducible to a Money Value.*

The matter of the obligation—that is, the thing to be done or forborne—must possess, or must be reducible to, a pecuniary value. It must have some ascertainable value, in order to distinguish legal from moral and social relations. Gratitude for a past kindness cannot be measured by any standard of value, nor can annoyance and disappointment, caused by the breach of a social engagement. Courts of law can only deal with matters to which the parties have attached an importance estimable by a standard of value of which the courts may take cognizance.

#### CONCURRENCE OF AGREEMENT AND OBLIGATION.

**5. An agreement resulting in contract is that form of agreement which directly contemplates and creates an obligation; and the contractual obligation is that form of obligation which springs directly from agreement.**

**EXCEPTIONS**—As before stated, there are exceptions in the case of those obligations called quasi contracts.

“Agreement” is a broader term than “contract,” and includes acts in the law of two kinds besides those which we ordinarily term contracts:

(1) An agreement, for instance, may not create an obligation, and therefore, in reason, may not result in a contract, because its effect is concluded as soon as the parties have expressed their common assent. Such are conveyances of land without covenants, gifts, and sales of chattels for cash, with immediate delivery, and without warranty. The agreement of the parties effects at once a transfer of rights in rem, and leaves no obligation subsisting between them. It is otherwise if the conveyance is with covenants annexed, or if the sale is on future delivery, or on credit, or with a warranty. Such agreements are called “executed contracts,” but they create

no outstanding contractual obligation, and it is at least questionable whether they can properly be termed contracts.\*

(2) Again, agreements may create obligations only incidentally or remotely, and will therefore not constitute a contract; the essence of contract being in the fact that the direct purpose of the agreement is to create an obligation. These agreements have the characteristic just alluded to of effecting their main object immediately upon the expression of the intention of the parties, but they differ from simple conveyances and gifts, not only in creating outstanding obligations between the parties, but sometimes providing for the coming into existence of other obligations, and those not between the original parties to the agreement. Marriage, for instance, sometimes erroneously called a contract, effects a change of status from the moment the consent of the parties is expressed before a competent authority. At the same time it creates obligations between the parties which are incidental to the transaction, and to the immediate objects of the expression of consent or agreement. So, also, a settlement of property in trust for persons unborn effects much more than the mere conveyance of a legal estate to the trustee. It imposes on him incidental obligations, some of which may not come into existence for a long time. It creates possibilities

\* There is the highest authority for speaking of conveyances of land without covenants, gifts, and sales of goods for cash, with immediate delivery, and without warranty, as executed contracts. 2 Bl. Comm. 443; 1 Story, Cont. § 22; Fletcher v. Peck, 6 Cranch, 87. The propriety, however, of calling such agreements contracts has, with reason, been questioned. Anson, Cont. 3. It is of the essence of contract, as a legal conception, that it shall contemplate and create a right in personam; that it shall impose an obligation on one of the parties to do or forbear from doing some act. An agreement by which a person binds himself to convey land would therefore be a contract; but how can a conveyance be called a contract? It creates no obligation, but, at the very moment the parties agree, the agreement is carried out. Until the deed is delivered and accepted there is no agreement, and therefore no contract. At the moment when it is delivered and accepted there is agreement, but at that moment also the agreement is fully performed. There is at no time any obligation. An executory contract, when it has been fully performed, as, for instance, an agreement to convey land performed by conveyance, may properly be called an executed contract, for there has been a contract; but a conveyance of land, as distinguished from an agreement to convey, has, strictly speaking, never been a contract at all. It is the execution of a contract, and not a contract. To the effect that an executed gift is not a contract, see *Wheeler v. Glasgow* (Ala.) 11 South. Rep. 753.

of obligation between him and persons who are not yet in existence. These obligations are the result of agreement, but they are not contract.<sup>14</sup>

*Sources of Obligation*<sup>15</sup>—*Directly from Agreement.*

Obligation may arise directly from agreement. Here we find that form of agreement which constitutes contract. An offer is made by one person and accepted by another, so that one consents to intend, and the other to expect, the same thing; and the result of this agreement is a legal tie, binding the parties to one another in respect to some future act or forbearance.

*Same—Delict or Tort.*

Obligation may arise from delict or tort. This occurs where a primary right to forbearance has been violated; where, for instance, a right to property, to security, or to character has been violated by trespass, assault, or defamation. The wrongdoer is bound to pay to the injured party whatever damages he has sustained, and, under some circumstances, further damages by way of punishment. Such an obligation is not created by the free will of the parties, or by agreement, but springs up immediately upon the occurrence of the wrongful act. The person injured has a cause of action which is said to arise *ex delicto*, as distinguished from such as arise *ex contractu*.<sup>16</sup>

*Same—Breach of Contract.*

Obligation may arise from breach of contract. While one person is under promise to another, the promisee has a right against the promisor to performance of the promise when performance becomes due, and to the maintenance up to that time of the contractual relation. But, if the promisor breaks his promise, the promisee's right to performance has been violated, and, even if the contract is not discharged, a new obligation springs up,—a right of action for damages, similar to that which arises upon a delict or tort. The cause of action results from the breach of contract, and is said to arise *ex contractu*.

<sup>14</sup> *Anson*, Cont. 3; *Wade v. Kalbfleisch*, 58 N. Y. 282; *Ditson v. Ditson*, 4 R. I. 87; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. Rep. 723; *Watkins v. Watkins*, 135 Mass. 83.

<sup>15</sup> *Anson*, Cont. 7.

<sup>16</sup> *Leake*, Cont. 3.



*Same—Quasi Contract—Judgments.*

Obligation may arise from the judgment of a court of competent jurisdiction ordering something to be done or forborne by one party in respect of another. This kind of obligation is called a "contract of record." It may arise from entry of judgment by consent of the parties, in which event the element of agreement is present; but, on the other hand, it may arise against the will of the party bound thereby, in which case there is no element of agreement, and therefore no true contract. Such an obligation is quasi contractual, like those obligations mentioned in the following paragraph.\*

*Same—Quasi Contract from Acts of Parties.*

Again, obligation may arise from quasi contract because of acts of the parties. This is the term applied to a class of legal relations in which there is neither agreement nor delict or breach of duty. A person pays something which another ought to pay, or receives something which another ought to receive, and the law imposes on him the duty to make good to the other party the advantage to which the latter is so entitled. The law creates or implies a promise to perform this duty, and so invests the relation with the semblance of contract. As the term "quasi" implies, these obligations are not contracts in the proper sense; and the time will probably come when they will no longer be treated as contracts.†

*Same—Indirectly from Agreement—Marriage—Trusts.*

Finally, obligation may spring from agreement, and yet be distinguishable from contract. As explained in speaking of agreement, this is the case with obligations incidental to such acts as marriage and the creation of a trust. Contractual obligations may arise incidentally to an agreement which has for its direct object the transfer of property. In the case of a conveyance of land with covenants annexed, or the sale of a chattel with a warranty, the obligation hangs loosely to the conveyance or sale, and is so easily distinguishable that it may be dealt with as a contract. But in cases of trust or marriage the agreement is far-reaching in its objects, and the obligations incidental to it are either contingent, or at any rate remote from its main purpose or immediate operation.

\* Post, p. 70.

† Post, p. 752.

To create an obligation is the one object which the parties have in view when they enter into that form of agreement which is called contract.

### PROMISE.

6. A promise is the declaration by a person, by words or by conduct, of an intention and willingness to be bound to do or to forbear from doing something at the request or for the use of another, when, but not before, that declaration has become binding by its acceptance by the promisee so as to create any obligation.<sup>17</sup> A promissory expression before acceptance is merely an offer of a promise.

We are in the habit of considering as the essential feature of contract a promise by one or more parties to another or others to do or forbear from doing certain specified acts; and many of the books use the term "promise," rather than "agreement," to define contract. "In an agreement as the source of a legal contract," it is said, "the matter intended and agreed imports that the one party shall be bound to the other in some act or performance, which the latter shall have a legal right to enforce." The signification of an intention to do some act, or observe some particular course of conduct, made by the one party to the other, and accepted by him, for the purpose of creating a right to its accomplishment, is called a promise.<sup>18</sup>

The term "promise" is used to signify a binding promise, as opposed to a mere offer of a promise. A promissory expression amounting to an offer of a promise does not become a promise until it becomes binding by its acceptance by the person to whom it is made. Before it is accepted it is a mere offer of a promise, called in the civil law a "pollicitation."<sup>19</sup> It must also be noted that it is not every statement of intention that will amount to an offer of a promise which by acceptance will be turned into a promise. An offer differs from a mere statement of intention in that it imports a willingness to be bound to the party to whom it is made. If a

<sup>17</sup>Anson, Cont. 4; Pol. Cont. 1.

<sup>18</sup>Leake, Cont. 13.

<sup>19</sup>See post, p. 35.

person says to another, "I intend to sell my horse if I can get \$100 for it," there is no offer that can be turned into an agreement, but merely a declaration of intention. There is no declaration of willingness to be bound. If, however, he says, "I will sell you my horse if you will give me \$100 for it," there is an offer, and, if it is accepted, there is a contract, consisting of mutual binding promises to deliver the horse on the one side, and to accept and pay for it on the other.<sup>20</sup>

Upon this principle that expressions not intended to be binding do not constitute a promise it is held that commendatory expressions concerning the quality of goods made upon negotiation for sale, without intending to warrant the quality, do not create a contract of warranty; and that expressions in business circulars, stating the terms on which goods will be sold, do not amount to offers which may be turned into a binding promise by acceptance. In discussing Agreement we have already shown that there must be no doubt. If a promise is so indefinite that it cannot reasonably be determined what was intended, it is not enforceable. We have also seen that the agreement must refer to legal relations. A promise to perform some social function, or a promise made in fun, without contemplating legal consequences, is not enforceable. Nor, as we shall see, is a promise enforceable if there is wanting a particular form, or a consideration, or both, required by law; or if the object is unlawful.

Looking at contract, then, in the light of a promise, we may say that there are three stages necessary to the making of that sort of agreement which results in a contract: (1) There must be an offer; (2) there must be an acceptance of the offer, resulting in a promise; and (3) the law must attach a binding force to the promise, so as to invest it with the character of an obligation.

The promise results from the agreement of the parties, and necessarily results from every agreement which directly contemplates

<sup>20</sup> In *Randall v. Morgan*, 12 Ves. 67, a person, in answer to a suitor for his daughter, wrote: "I shall allow her the interest on £2,000 whether she remains single or marries. If the latter, I may bind myself to do it, and pay the principal at my death to her and her heirs." This, though acted upon by the suitor, was construed not to import an intention to give a binding promise, and consequently was held not to create a contract.

and creates an obligation. The agreement makes the contract, and the promise is merely a feature of the contract.

In treating of the question of consideration, we shall see that a consideration—that is, some benefit accruing to the promisor or detriment suffered by the promisee—is necessary. A gratuitous promise, or promise without consideration, if not under seal, is said to be nudum pactum.

### VOID, VOIDABLE, AND UNENFORCEABLE AGREEMENTS.

**7. A void agreement is one that is entirely destitute of legal effect.**

**8. A voidable contract is one that is capable of being affirmed or rejected at the option of one of the parties, but which is binding on the other.**

**9. An unenforceable contract is one that is valid, but incapable of being sued upon or proven.**

In the course of our discussion we will frequently have occasion to use the terms “void,” “voidable,” and “unenforceable,” as applied to agreements or contracts, and some explanation of them is advisable at the outset.

We have seen, and in dealing with the formation of contract we will see more in detail, that certain requisites are essential, and, if they are absent, the contract is said to be void. By this it is meant that it has no legal effect whatever. Clearly, in such a case, there is no contract at all, and it is a misuse of terms to speak of it as such. A transaction or agreement cannot be void and be called a contract, so it is more accurate to say that the transaction or agreement is void.

A voidable contract is not destitute of legal effect, but may be valid and binding. It is a contract that is capable of being affirmed or rejected at the option of one of the parties. It is binding if he chooses to affirm it, and is of no effect if he chooses to reject it. The other party has no say in the matter. Such is the case, as we shall see, with contracts into which one of the parties has induced the other to enter by means of fraud. The latter may re-

puddiate the contract, or, if he sees fit, he may waive the fraud, and hold the former to his bargain.

It will seem, at first thought, that certain agreements said to be void are not so in fact. For instance, as we shall see, an agreement may be void on the ground of mistake, or, in a few cases, because of the infancy of one of the parties; but, if the mistake or infancy is not pleaded in the action to enforce it, the parties will be held bound. Such an agreement, however, is just as void as an agreement to do something which the law forbids. The cause of nullity is latent, but this does not alter the character of the transaction. It is void if the defendant chooses to prove it so.<sup>21</sup>

If the defendant in these cases may, at his option, avoid the contract, or let it stand, there would seem to be a certain unreality in the distinction between void and voidable agreements; but this is not so in fact. In case of voidable agreements there is a contract, though it is marked by a flaw; and the party who has the option may affirm it in spite of the flaw. Where, however, an agreement is void, it falls to the ground as soon as its nullity becomes apparent. It is incapable of affirmance. Another distinction is in the fact that in case of voidable contracts innocent third persons, acting in good faith, may acquire rights thereunder, and thereby cut off the right to avoid it; but no such rights can be acquired where the transaction is void. As we shall see when we come to treat of the formation of contract, if a person sells goods to another, being led to think that the vendee is somebody else, and the vendee sells them to an innocent third person, the latter acquires no rights in the goods, for the contract is void on the ground of mistake.<sup>22</sup> Where, however, a person sells goods to another, being led by the latter's fraud to think that the market is falling, an innocent purchaser for value from the vendee acquires title, and the vendor is left to his action against his vendee for damages for deceit. The contract is voidable only.<sup>23</sup> In the first case the complete nullity of the transaction prevents any rights arising under it if the mistaken party choose to avoid it; in the second there is a contract,

<sup>21</sup>Anson, Cont. 204.

<sup>22</sup>Cundy v. Lindsay, 3 App. Cas. 463.

<sup>23</sup>Babcock v. Lawson, 4 Q. B. Div. 394.

and one capable of creating rights, and the person defrauded has but a limited right to set it aside.

A contract which is unenforceable cannot be set aside at the option of one of the parties to it. The obstacles to its enforcement do not touch the existence of the contract, but only set difficulties in the way of action being brought or proof given. The contract is valid, but because of these obstacles it cannot be enforced. Such is a contract, as we shall see, which falls to comply with some of the provisions of the statute of frauds, requiring writing, and so cannot be proved; or a contract which has become barred by the statute of limitations. The defect in these contracts is not irremediable. In the first it may be remedied by supplying the writing, and in the second by procuring a proper acknowledgment of the barred debt; but it will be noticed that the defect can be remedied only with the concurrence of the party to be made liable.

### ESSENTIALS OF CONTRACT.

Having ascertained the particular features of contract as a juristic conception, the next step is to ascertain how contracts are made. A part of the definition of contract being that it is an agreement enforceable at law, it follows that we must analyze the elements of a contract such as the law will hold to be binding between the parties to it.

10. As there must be an agreement directly contemplating and resulting in an obligation, and the agreement must be enforceable in the law, therefore—

(a) There must be a distinct communication by the parties to one another of their intention, or an offer and acceptance.

(b) The agreement must possess the marks which the law requires in order that it may affect the legal relations of the parties, and be an act in the law. Therefore—

(1) It must be in the form required by law.

(2) There must be a consideration, when required by law.

- (c) The parties must be capable in law of making a valid contract.
- (d) The consent expressed in offer and acceptance must be genuine.
- (e) The objects which the contract proposes to effect must be legal.

Where all of these elements coexist, a valid contract is the result. If any one of them is absent, the agreement is in some cases merely unenforceable; in some voidable at the option of one of the parties; and in some absolutely void. We will now take up in turn each of these elements in separate chapters, and in the course of the discussion it will be seen that most of the principles of the law of contract spring from the very nature of agreement or obligation, as just explained. It is for this reason that it has been sought to give at the outset a general idea of what is meant by those terms.

## CHAPTER II.

### OFFER AND ACCEPTANCE.

- 11-13. In General.
- 14. Rules Stated.
- 15, 16. Communication by Conduct—Implied Contracts.
- 17. Necessity for Communication.
- 18. Necessity for Acceptance.
- 19. Character, Mode, Place, and Time of Acceptance.
- 20-22. Effect of Acceptance.
- 23-26. Revocation of Offer.
- 27. Lapse of Offer.
- 28. Offers to the Public Generally.
- 29, 30. Offer as Referring to Legal Relations.

### IN GENERAL.

11. To constitute a contract by agreement, the expression of common intention must generally, if not always, arise from an offer made by one party to another, and an acceptance by the latter, with the result that one or both are bound by a promise.

12. The offer may be—

- (a) Of a promise, or
- (b) Of an act.

13. The acceptance may be—

- (a) Simple assent; but this applies to contracts under seal only.
- (b) Giving of a promise.
- (c) Doing of an act.

In practical matters, and for the purpose of creating obligations, every expression of a common intention arrived at by two or more parties is ultimately reducible to question and answer, or to offer and acceptance.<sup>1</sup> Thus, if a person agrees to sell an article to

<sup>1</sup> Anson, Cont. 11; Leake, Cont. 12; *Thruston v. Thornton*, 1 Cush. (Mass.) 91. Pollock objects that this analysis does not properly apply to a case in



another for a certain price, and the latter agrees to buy it, we can trace the process to the moment when the seller says in words or by conduct, "Will you give me so much for the article?" and the buyer replies, "I will;" or when the buyer says, "Will you take so much for the article?" and the seller says, "I will." There is always this question and answer, or offer and acceptance, though in many cases it is not in so many words. A tradesman displaying his goods says in act, though not in words, "Will you buy my goods at my price?" and a customer taking goods with the tradesman's cognizance virtually says, "I will." The proprietor of a public conveyance, by running it in such a way and place as to invite people to use it, virtually says, "Will you pay me the fare if I carry you?" and one who gets into the conveyance to be carried, by his conduct says, "I will," as plainly as if he were to use the words. And so all voluntary contracts may be reduced to question and answer, either in words, or by conduct, or both. The question is the offer; the answer the acceptance of the offer.

*Forms of Offer and Acceptance.*

(1) A contract may originate in the offer of a promise, and its acceptance by simple assent, but this applies only to contracts under seal, for, as will presently be seen, the law requires a consideration to support a promise not under seal, and mere assent is not enough. Thus, where one person promises another by writing under seal that he will do a certain thing, or pay a certain sum, and the promisee assents to the proposal, both are bound, and there is a contract. Until such assent, there is only an offer. The offer, unlike offers not under seal, is at common law irrevocable, owing to the seal; but until it has been assented to by the person to whom it is made it does not bind him. A person cannot be forced to accept even a benefit, though, under some circumstances, acceptance may be presumed by the law where there is nothing to show the contrary.

which the consent of the parties is declared in a set form,—as where they both execute a deed or sign a written agreement. Pol. Cont. 4. But he adds that, "notwithstanding the difficulties that arise in making proposal and acceptance necessary parts of the general conception of contract, there is no doubt that in practice they are the normal and most important elements." Id. 8.

(2) As already shown, the presence of a public conveyance on the street is a constant offer by its proprietor to carry persons, and when a person steps into the conveyance he accepts the offer, and promises to pay the fare. This is an offer of an act for a promise.

(3) If a person who has lost property offers by advertisement a reward to any person who shall return it, he offers a promise for an act, and when a person returns the property he accepts and performs the act, and the promise becomes binding.

(4) If a person offers another to pay him a certain sum on a future day if the latter will promise to perform certain services for him before that day, or, vice versa, he offers a promise for a promise, and where the person to whom the offer is made accepts it by promising to perform the services or to pay, as the case may be, both parties are bound, the one to do the work and the other to make the payment. This is the offer of a promise for a promise.

*Executed and Executory Consideration.*

It will be noticed that cases (2) and (3) differ from (4) in an important respect. In (2) and (3) the contract is formed by one party doing all he can be required to do under the contract. The contract is formed by performance on one side, and it is this performance which makes obligatory the promise on the other. The outstanding obligation is all on one side. In (4) each party is bound to some act or forbearance in the future. There is an outstanding obligation on both sides. Where the benefit, in contemplation of which the promise is made, is done at the same time that the promise acquires a binding force,—where it is the doing of the act that concludes the contract,—then the act so done is called an executed or present consideration for the promise. Where a promise is given for a promise, each forming the consideration for the other, the consideration is said to be executory or future.

**GENERAL RULES STATED.**

14. Before going into a discussion of the rules relating to offer and acceptance, it may be well to state them generally as follows:

- (a) Offer and acceptance may be communicated by conduct as well as by words.

- (b) They must both be communicated.
- (c) An offer must be accepted.
- (d) The acceptance must be absolute and identical with the terms of the offer.
- (e) An offer, not under seal, may be revoked, or may lapse, at any time before acceptance, but not afterwards.
- (f) An offer need not be made to an ascertained person, but must be accepted by an ascertained person before it will become binding.
- (g) The offer must be intended to create, and must be capable of creating, legal relations.

The general rules above stated spring from the very nature of contract, as involving the elements of agreement and obligation. Unless the offer and acceptance comply with them, there can be neither agreement nor obligation, and without this there cannot be a contract. This is probably the most important branch of the law of contracts, and, unless it is thoroughly understood, there will be no use for the student to waste his time by reading further. The student is particularly cautioned to read as many of the cases cited as he can in connection with the text, beginning with those first cited, and, above all, not to attempt to memorize the black-letter text until he understands the principles on which it is based. The law cannot be learned by memorizing formulae.

#### COMMUNICATION BY CONDUCT—IMPLIED CONTRACTS.

15. An offer or its acceptance may be communicated by conduct as well as by words.

16. In such a case the contract is said to be implied. It is, however, implied as a matter of fact. There is an agreement in fact, evidenced by acts.

From what has already been said as to the possible forms of offer and acceptance, it will have been seen that conduct may

take the place of written or spoken words in the making of contracts.<sup>2</sup>

If a person asks another to perform a service for him, the latter may accept the offer simply by performing the service, unless a particular form of acceptance is prescribed in the offer. His acceptance is inferred or implied from his conduct.<sup>3</sup>

Again, if a person allows another to work for him under such circumstances that no reasonable man would suppose that the latter means to do the work for nothing, he will be liable to pay for it. The doing of the work is an offer; the permission to do it, or acquiescence in its being done, is the acceptance. The acceptance of the offer is inferred or implied as a matter of fact from the circumstances.<sup>4</sup>

<sup>2</sup> *Morse v. Bellows*, 7 N. H. 549; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Smith v. Ingram*, 90 Ala. 529, 8 South. Rep. 144; *Wetmore v. Mell*, 1 Ohio St. 26; *Sturges v. Robbins*, 7 Mass. 301; *Train v. Gold*, 5 Pick. (Mass.) 384; *New York & N. H. R. Co. v. Pixley*, 19 Barb. (N. Y.) 428. Taking goods; implied promise to pay for them. *Stoudenmire v. Harper*, 81 Ala. 242, 1 South. Rep. 857. Sending goods in response to an order is an acceptance of the offer to buy contained in the order. *Crook v. Cowan*, 64 N. C. 743; *Briggs v. Sizer*, 30 N. Y. 652; *Harvey v. Johnston*, 6 C. B. 295. Retention of the order, if explained, is not an acceptance. *Briggs v. Sizer*, 30 N. Y. 652. Paying taxes for another in accordance with a request from the latter to do so, and an offer to reimburse, is an acceptance of the offer. *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. Rep. 869. And so the performance of services requested in an offer by advertisement or otherwise to the public generally is an acceptance of the offer. *Post*, p. 55. Taking possession of property in accordance with a letter offering to sell it is an acceptance. *Dent v. Steamship Co.*, 49 N. Y. 390. Where the acceptance of an offer to pay for doing work is the doing of the work, the proposer cannot escape liability on his promise on the ground that the acceptor did not at the time of the offer engage to do the work. *Des Moines V. R. Co. v. Graff*, 27 Iowa, 99.

<sup>3</sup> See *Relf v. Paige*, 55 Wis. 503, 13 N. W. Rep. 473; *Coston v. Morris*, 4 N. Y. Supp. 89. See, also, *post*, p. 55, and notes.

<sup>4</sup> *Paynter v. Williams*, 1 Crompt. & M. 810; *Day v. Caton*, 119 Mass. 513; *Huck v. Flentye*, 80 Ill. 258; *De Wolf v. City of Chicago*, 26 Ill. 444; *Blount v. Guthrie*, 99 N. C. 93, 5 S. E. Rep. 890; *Hartuppee v. City of Pittsburg*, 97 Pa. St. 107; *Curry v. Curry*, 114 Pa. St. 367, 7 Atl. Rep. 61; *Tucker v. Preston*, 60 Vt. 473, 11 Atl. Rep. 726; *Thomas v. Walnut Land & C. Co.*, 43 Mo. App. 653; *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. Rep. 455; *Joseph v. Foundry & M. Co. (Ala.)* 10 South. Rep. 327. No promise, however, on the part of a person benefited by work, can be implied where the work

So, also, if a person sends goods to another, not under such circumstances as to reasonably lead the latter to suppose them a gift, and the latter uses or consumes them, he will be liable on an implied promise to pay what the goods are reasonably worth. The offer is made by sending the goods; the acceptance, by their use or consumption, which is in fact a promise to pay their price.\*

was done under a special contract with another person. *Walker v. Brown*, 28 Ill. 378; *Massachusetts Gen. Hospital v. Fairbanks*, 129 Mass. 78. The reason of this is that a promise cannot be implied where the whole matter is covered by an express contract. See *Phelps v. Sheldon*, 13 Pick. (Mass.) 50; *Walte v. Merrill*, 4 Greenl. (Me.) 102; *Stockett v. Watkins*, 2 Gill & J. (Md.) 326; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; *King v. Woodruff*, 23 Conn. 56.

\* *Hart v. Mills*, 15 Mees. & W. 87; *Manor v. Pyne*, 3 Bing. 288; *Larkin v. Mitchell & R. L. Co.*, 42 Mich. 296, 3 N. W. Rep. 904; *Kinney v. South. & N. A. R. Co.*, 82 Ala. 368, 3 South. Rep. 113; *Boyd v. Heine*, 41 La. Ann. 393, 6 South. Rep. 714; *Indiana Manuf'g Co. v. Hayes*, 155 Pa. St. 160, 26 Atl. Rep. 6; *Davis v. Badders*, 95 Ala. 348, 10 South. Rep. 422; *Doerr v. Woolsey* (Com. Pl. N. Y.) 7 N. Y. Supp. 662; *Empire Steam Pump Co. v. Inman*, 59 Hun, 230, 12 N. Y. Supp. 948; *Rosenfeld v. Swenson*, 45 Minn. 190, 47 N. W. Rep. 718. The person to whom the goods are sent must in some way deal with them as his own in order that an acceptance may be implied. If he does not choose to take them, he is not bound to return them. Pol. Cont. 11. Where goods are ordered, and only a part of them are sent, the person so ordering need not accept them. If he does so, however, he impliedly agrees to pay for them. In such a case he does not become liable for the original contract price, but for what the goods are reasonably worth. His implied contract to pay for what he has accepted depends, not upon his order, but upon his retention of the goods. *Chapman v. Dease*, 34 Mich. 375; *Dermott v. Jones*, 23 How. 220; *Starr Glass Co. v. Morey*, 108 Mass. 570; *Goodwin v. Merrill*, 13 Wis. 737; *Richards v. Shaw*, 67 Ill. 222. But see *Keln v. Tupper*, 52 N. Y. 550. Taking part of the goods sent is not an acquiescence in the failure to send all that were ordered, so as to render the acceptor liable to pay for that portion of those sent which he returned. *Hart v. Mills*, 15 Mees. & W. 87. Order for goods accepted by shipment. *D. M. Osborne & Co. v. Van Atten*, 3 Wash. T. 53, 13 Pac. Rep. 242. Keeping of property by a person to whom it has been sent to be sold after he has received a proposition from the owner to sell to him, and his failure to reply to the proposition, is an acceptance of it. *Orme v. Cooper*, 1 Ind. App. 449, 27 N. E. Rep. 655. And see, for a similar case, *House v. Beak*, 141 Ill. 290, 30 N. E. Rep. 1005. It has been held that a person to whom goods are sent as on a sale must either return them, or notify the seller that he will not accept them (*Thompson v. Douglass*, 35 W. Va.

Where conduct is relied on as constituting acceptance, it must be something more than mere silence; it must be silence under such circumstances as to amount to acquiescence or assent.\*

*"Implied Contracts"—The Term Explained.*

We will presently come to deal with a class of so-called "implied contracts," which are implied as a matter of law without any agreement in fact. They are more properly called "quasi contracts," and are contracts created by law, and not by the parties. There is no real agreement or contract whatever. These so-called implied contracts must be distinguished from the contracts with which we are dealing here; there is very little in common between them. Contracts implied from the conduct of the parties are implied as a matter of fact, and not as a matter of law. There is, in fact, an agreement between the parties, though it is shown by their acts, and not by express words.<sup>7</sup> If a man says to another in words, "I will sell you this article for the market price," and the latter, taking it, says in words, "I accept your offer, and will pay the price," there is an express contract, evidenced by express words. If a man sends another goods under such circumstances as to show that he expects payment, and the latter accepts and consumes the goods, there is an implied contract that he will pay the market price, evidenced by the conduct of the parties in sending the goods on the one side, and in accepting and using them on the other. Sending the goods is an offer to sell them, and accepting and using them is an acceptance of the offer. There is no difference in the two contracts except in the evidence by which the agreement is shown.\*

We shall presently see that an offer must be intended to create legal relations, in order that it may be turned into a contract by acceptance. Whether or not, therefore, a contract will be implied as a matter of fact from the conduct of the parties, depends upon their intention, for unless they intend to contract there is no con-

337, 13 S. E. Rep. 1015); and that, if he disclaims a purchase, he is liable if, though by mistake, he permits a third person to take and convert the goods (Id.). See post, p. 38.

\* *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6, 12 Atl. Rep. 607; *O'Neal v. Knippa* (Tex. Sup.) 19 S. W. Rep. 1020.

<sup>7</sup> Pol. Cont. 9-11; Leake, Cont. 11.

\* *Bixby v. Moor*, 51 N. H. 402; post, p. 752.

tract in fact; but it depends upon their intention as evidenced by their acts. The law implies a contract from their conduct because their conduct shows an intention to contract. If it be shown that there was in fact no such intention, a contract cannot be implied. This, however, is to be qualified by the rule that if one party so acts as to lead the other party to believe he intends to agree, and to act on such belief, he will not be heard to say that he did not intend to agree. His conduct conclusively shows agreement. The question is one of evidence. Does the conduct of the parties, in the light of all the circumstances, prove intention to contract? If it does, then a contract is proven as a fact.

### *Relationship of the Parties.*

Where one person renders services for another, or supports another, the relationship of the parties is of great weight in determining their intention. If the relationship is that of parent and child, even though the child has attained his or her majority, there is a presumption that no compensation was intended;<sup>8</sup> and this applies not only where the relationship of parent and child actually exists, but also where one of the parties stands in loco parentis to the other, which amounts to the same thing.<sup>9</sup> Most courts do not stop at this, but apply the rule wherever the parties occupy a near relationship, or, though not related at all, or only distantly, are members of the same family, and the services consist either in household or other family duties by one party, and support and maintenance by the other.<sup>10</sup> In some cases the presumption against

<sup>8</sup> *Young v. Herman*, 97 N. C. 280, 1 S. E. Rep. 792; *Bantz v. Bantz*, 52 Md. 693; *Cowan v. Musgrave*, 73 Iowa, 384, 35 N. W. Rep. 496; *McGarvey v. Roods*, 73 Iowa, 363, 35 N. W. Rep. 488; *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. Rep. 349; *In re Young's Estate*, 148 Pa. St. 575, 24 Atl. Rep. 124; *Howe v. North*, 69 Mich. 272, 37 N. W. Rep. 213; *Allen v. Allen*, 60 Mich. 635, 27 N. W. Rep. 702; *Grant v. Grant*, 109 N. C. 710, 14 S. E. Rep. 90.

<sup>9</sup> *Dodson v. McAdams*, 96 N. C. 149, 2 S. E. Rep. 453; *Ormsby v. Rhoades*, 59 Vt. 505, 10 Atl. Rep. 722; *Starkie v. Perry*, 71 Cal. 495, 12 Pac. Rep. 508; *Wyley v. Bull*, 41 Kan. 206, 20 Pac. Rep. 855; *Appeal of Barhite*, 126 Pa. St. 404, 17 Atl. Rep. 617; *Harris v. Smith*, 79 Mich. 54, 44 N. W. Rep. 169.

<sup>10</sup> *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. Rep. 545; *Cone v. Cross*, 72 Md. 102, 19 Atl. Rep. 391; *Curry v. Curry*, 114 Pa. St. 367, 7 Atl. Rep. 61; *Feiertag v. Feiertag*, 73 Mich. 297, 41 N. W. Rep. 414; *Patterson v. Collar*, 81 Ill. App. 340; *Id.* 137 Ill. 403, 27 N. E. Rep. 604; *Reeves' Estate v. Moore*,

the existence of a contract does not exist.<sup>11</sup> As to this, the authorities are in conflict. In some states, a presumption that the services were gratuitous only arises in the case of parent and child, or child and person standing in loco parentis. In most states, however, the presumption arises in all cases where the parties occupy the position of members of the same family; the one furnishing support, and the other rendering services. In all cases it may be shown that there was an agreement for compensation.<sup>12</sup> As said in an Indiana case, a contract will be implied, notwithstanding the relationship, where there is hope of compensation on one side and expectation to award it on the other.<sup>13</sup>

### NECESSITY FOR COMMUNICATION.

17. Both the offer and the acceptance, whether they are by words or by conduct, must be communicated. This is absolutely essential.

In all cases there must be communication, both of the offer and acceptance. This is essential, for without communication there can be no meeting of minds, and therefore no agreement; and, without agreement, contract, as we have seen, is impossible.

4 Ind. App. 492, 31 N. E. Rep. 44; Gertz v. Webber, 151 Pa. St. 396, 25 Atl. Rep. 82.

<sup>11</sup> In re Shubart's Estate, 154 Pa. St. 230, 26 Atl. Rep. 202.

<sup>12</sup> As to the sufficiency of the evidence to show that there was a contract, see Pritchard v. Pritchard, 69 Wis. 373, 34 N. W. Rep. 506; McMillan v. Page, 71 Wis. 655, 38 N. W. Rep. 173; Shane v. Smith, 37 Kan. 55, 14 Pac. Rep. 477; Petty v. Young, 43 N. J. Eq. 654, 12 Atl. Rep. 392; Appeal of Lindsey (Pa. Sup.) 15 Atl. Rep. 434; Doremus v. Lott, 49 Hun, 284, 1 N. Y. Supp. 798; Hill v. Hill, 121 Ind. 255, 23 N. E. Rep. 87; Hogg v. Laster, 56 Ark. 382, 19 S. W. Rep. 975; Henzler's Estate v. Bossard, 6 Ind. App. 701, 33 N. E. Rep. 217; Zimmerman v. Zimmerman, 129 Pa. St. 922, 18 Atl. Rep. 129; Havens v. Havens, 50 Hun, 605, 3 N. Y. Supp. 219; Spitzmiller v. Fisher, 77 Iowa, 289, 42 N. W. Rep. 107; Ellis v. Cary, 74 Wis. 176, 42 N. W. Rep. 232; Davis v. Gallagher, 55 Hun, 593, 9 N. Y. Supp. 11; Kirkpatrick v. Gallagher, 34 S. C. 255, 13 S. E. Rep. 450; McCormick v. McCormick, 1 Ind. App. 594, 28 N. E. Rep. 122; Story v. Story, 1 Ind. App. 284, 27 N. E. Rep. 573; Stock v. Stoltz, 137 Ill. 349, 27 N. E. Rep. 604; Wayman v. Wayman (Ky.) 22 S. W. Rep. 557; O'Kelly v. Faulkner (Ga.) 17 S. E. Rep. 847.

<sup>13</sup> Huffman v. Wyrick, 5 Ind. App. 183, 31 N. E. Rep. 823.



*Communication of Offer.*

As we have just said, where conduct is relied on as constituting acceptance, it must be something more than mere silence; it must be silence under such circumstances as to amount to acquiescence. Now it is impossible that acquiescence amounting to acceptance of an offer can be presumed from mere silence, where the offer was never communicated to the person sought to be so charged. Thus, where a person who had been engaged to command a ship threw up his command during the voyage, but helped to work the vessel home, and then claimed compensation for such services, it was held that he could not recover.<sup>14</sup> Evidence "of a recognition or acceptance of services," it was said, "may be sufficient to show an implied contract to pay for them, if at the time the defendant had power to accept or refuse the services;" but in this case the defendant never had such an option, and repudiated the services when he became aware of them. The offer, not having been communicated to the owner of the vessel, did not admit of acceptance, and could give no rights against him. As said in the case mentioned: "Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"

*Communication of Acceptance.*

It is also essential that the acceptance shall be communicated to the person who made the offer, or, at least, as we shall presently explain, that it shall be put in a proper way to be communicated to him. An acceptance which does not go beyond an uncommuni-

<sup>14</sup> Taylor v. Laird, 25 L. J. Exch. 329. And see Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, in which it was held that a person who removed another's property without the latter's knowledge, to prevent its destruction by fire, could not recover for his services, because no offer was ever communicated. See, also, Thornton v. Village of Sturgis, 38 Mich. 639, in which a newspaper which had published the ordinances of a village without authority unsuccessfully sought to recover therefor on the ground that the village had accepted, appropriated, and benefited by the services so rendered. And see Nagle v. McMurray, 84 Cal. 539, 24 Pac. Rep. 107; Burrows v. Ward, 15 R. I. 346, 5 Atl. Rep. 500; Brennan v. Chapin (Com. Pl. N. Y.) 19 N. Y. Supp. 237; Mann v. Farnum, 17 Colo. 427, 30 Pac. Rep. 332.

cated mental determination cannot create a binding contract,<sup>15</sup> and it is immaterial in what form the offer was framed, or that the intention to accept did in fact exist. Where, for instance, a person by letter offered to buy another's horse for a certain price, adding, "If I hear no more about him, I consider the horse is mine at that price," and no answer was returned, it was held that there was no contract, and this, though it appeared that the person to whom the offer was sent had made up his mind to accept.<sup>16</sup> A person making an offer may, as we shall see, prescribe a particular form of acceptance, but he cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it. It is easy to imagine cases in which a proposal may be made under such circumstances as not to call for a communication of the acceptance,—as, for instance, where a proposal is made by letter, which does not by necessary implication, under all the circumstances, call for a reply in case of acceptance;<sup>17</sup> but, though

<sup>15</sup> *White v. Corlies*, 46 N. Y. 467; *Felthouse v. Bindley*, 11 O. B. (N. S.) 869; *Hebb's Case*, L. R. 4 Eq. 9; *Brogden v. Metropolitan Ry. Co.*, L. R. 2 App. Cas. 691; *Stitt v. Huidekopers*, 17 Wall. 385; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Van Valkenburg v. Rogers*, 18 Mich. 180; *McDonald v. Boeing*, 43 Mich. 394, 5 N. W. Rep. 459; *Wagner v. Egleston*, 49 Mich. 218, 13 N. W. Rep. 522; *Strasburg R. R. Co. v. Echternacht*, 21 Pa. St. 220; *Ueberroth v. Riegel*, 71 Pa. St. 280; *Beckwith v. Cheever*, 21 N. H. 41; *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. Rep. 441; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Stuart v. Valley R. Co.*, 32 Grat. (Va.) 148; *Johnson v. Jacobs*, 42 Minn. 168, 44 N. W. Rep. 6; *Cozart v. Herndon* (N. C.) 19 S. E. Rep. 158.

The acceptance must be placed beyond the acceptor's control and power to withdraw. *Trounstone v. Sellers*, supra; *Mactier v. Frith*, supra. And see *Lancaster v. Elliott*, 28 Mo. App. 86, in which it was held that a proposal by defendant to relinquish certain rights against plaintiff was not accepted by writing on the proposal the word "Accepted," and depositing in bank a sum of money to be applied as required by the proposal, where both the proposal and the deposit remained under plaintiff's control.

Where an order for goods is given to an agent of the manufacturer, a letter from the latter to the agent, without any notice to the person who gave the order, is not an acceptance, so as to render the order binding. *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. Rep. 897.

<sup>16</sup> *Felthouse v. Bindley*, supra.

<sup>17</sup> *Knowlton's Anson*, Cont. 17, note, citing *Fry v. Franklin Ins. Co.*, 40 Ohio St. 108; *Caton v. Shaw*, 2 Har. & G. (Md.) 14.

this may be so where the person to whom the letter was sent has acted on it, and seeks to hold the proposer, it cannot be that the proposer can so frame his letter as to render the person to whom it is sent liable as having accepted it merely because he did not communicate his intention not to accept.

The rule stated applies to acceptance by conduct as well as acceptance by words. Thus, in a New York case, the defendants had written the plaintiff, "Upon an agreement to finish the fitting up of offices, \* \* \* you can commence at once," but countermanded the note after the plaintiff had bought materials, and started to work on them, but before he had communicated such fact to them. It was held that there was no binding contract. "We understand the rule to be," it was said, "that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail, containing a proposal, may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him. In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act, uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer."<sup>18</sup>

<sup>18</sup> *White v. Corlies*, 46 N. Y. 467. And see *McIver v. Richardson*, 1 Maule & S. 557; *Mozeley v. Tinkler*, 1 Crompton, M. & R. 692.

Formal notice of acceptance is not essential. The offer may be accepted by performing the services requested, if such performance is of a character which renders it equivalent to notice.<sup>18</sup>

*Terms of Offer Partly Uncommunicated.*

If an offer contains on its face the terms of a complete contract, the acceptor will not be bound by any other terms intended to be included, unless he knew those terms, or had their existence brought to his knowledge, and was capable of informing himself of their nature.<sup>19</sup> Illustrations of this will most frequently arise in the case of contracts of carriage or bailment with a railroad company or warehouseman, evidenced by a ticket or other document containing terms modifying the liability of the carrier or bailee, though, of course, they may arise in the case of other contracts.

The law on this point was thus stated in an English case: "If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivery to him of the ticket in such a manner that he could see that there was writing on it, was, in the opinion of the jury, reasonable notice that the writing contained conditions."<sup>21</sup>

<sup>18</sup> *Hoffman v. Bloomsburg & S. R. Co.*, 157 Pa. St. 174, 27 Atl. Rep. 564; *Walters v. Glendenning* (Wis.) 58 N. W. Rep. 404.

<sup>19</sup> In order that a prospectus of a proposed publication may become a part of the contract of a subscriber for the work to be published, so that he may take advantage of statements contained therein, it must appear that the contents of the prospectus were communicated to him, so that he may be supposed to have been influenced thereby. *Tichnor v. Hart*, 52 Minn. 407, 54 N. W. Rep. 369.

<sup>21</sup> *Parker v. Southeastern Ry. Co.*, 2 O. P. Div. 423. Where a ticket by steamer from Dublin to Whitehaven contained on its face only the words, "Dublin to Whitehaven," it was held that the purchaser was not bound by conditions on the back of the ticket, which he had not seen, since the ticket was a complete contract on its face. *Henderson v. Stevenson*, L. R. 2 H. L. 470.

On the other hand, where a ticket had written on its face the words, "Subject to the conditions on the other side," and the person to whom it was

In all cases, however, the question is the same, namely, have the terms of the offer been fully communicated to the acceptor? And the tendency of judicial decision is towards a general rule that, if a man accepts a document which purports to contain the terms of an offer, he is bound by all the terms, though he may not choose to inform himself of their tenor, or even of their existence.<sup>22</sup>

*Contract under Seal.*

There is one exception to the inoperative character of an uncommunicated offer. This is in case of an offer under seal. The position of the party making the offer, however, is not that he is bound by the contract, for this can only be when an offer is accepted, but that he has made an offer which he cannot withdraw. For this reason the matter is best dealt with under the head of revocation of offers.

### NECESSITY FOR ACCEPTANCE.

**18. An offer before it will become a binding promise must be accepted.**

It is the universal rule, without exception, that an offer must be accepted before it will become a binding promise, and result in a contract.<sup>23</sup> This rule springs from the very nature of contract as

issued admitted knowledge that there were conditions, but said he had not read them, the conditions contained on the back were held binding notwithstanding they were not read. *Harris v. Great Western Ry. Co.*, 1 Q. B. Div. 515.

In another case the ticket contained on its face the words, "See back," and the person to whom it was given admitted knowledge of writing on the ticket, but denied all knowledge that the writing contained conditions. It was held that he was bound by the conditions if the jury were of opinion that the ticket amounted to a reasonable notice of their existence. *Parker v. Southeastern Ry. Co.*, supra.

<sup>22</sup> *Burke v. Southeastern Ry. Co.*, 5 C. P. Div. 1; *Watkins v. Rymill*, 10 Q. B. Div. 178; *McClure v. Phila., W. & B. R. Co.*, 34 Md. 532; *Johnson v. Same*, 63 Md. 106; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 Sup. Ct. Rep. 50; *Durgin v. American Exp. Co. (N. H.)* 20 Atl. Rep. 328; *Davis v. Central Vermont R. Co. (Vt.)* 29 Atl. Rep. 313.

<sup>23</sup> *Payne v. Cave*, 3 Term R. 148; *Tuttle v. Love*, 7 Johns. (N. Y.) 470; *Tucker v. Woods*, 12 Johns. (N. Y.) 190; *First Nat. Bank v. Hall*, 101 U. S. 43; *McKinley v. Watkins*, 13 Ill. 140; *Bruce v. Bishop*, 43 Vt. 161; *Weiden*

involving the element of agreement. Without agreement there cannot be contract, and without a meeting of minds in a common intention there cannot be agreement.<sup>24</sup> An unaccepted offer, therefore, cannot create any rights, or bind the party making it to the party to whom it is made. A fortiori, it cannot bind the party to whom it is made.<sup>25</sup> "A contract," it has been said by Pothier, "includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. A pollicitation is a promise not yet accepted by the person to whom it is made. Pollicitatio est solius offerentis promissum. A pollicitation, according to the rules of mere natural law, does not produce what can be properly called an obligation; and the person who has made the promise may retract it any time before it is accepted; for there cannot be any obligation without a right being acquired by the person in whose favor it is contracted against the party bound. Now, as I cannot, by the mere act of my own mind, transfer to another a right in my goods, without an intention on his part to accept them, neither can I by my promise confer a right against my person, until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right."<sup>26</sup>

There are two apparent exceptions to the rule that an offer must be accepted, but they are only apparent. An offer, if made under

*v. Woodruff*, 38 Mich. 130; *Brown v. Rice*, 29 Mo. 322; *Belfast & M. L. R. Co. v. Inhabitants of Unity*, 62 Me. 148; *Bowen v. Blessing*, 8 Serg. & R. (Pa.) 243; *King v. Warfield*, 67 Md. 246, 9 Atl. Rep. 539; *Demoss v. Noble*, 6 Iowa, 530; *Corning v. Colt*, 5 Wend. (N. Y.) 254; *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 31 Fed. Rep. 864; *Etheredge v. Barkley*, 25 Fla. 814, 6 South. Rep. 861; *Hodges v. Sublett*, 91 Ala. 588, 8 South. Rep. 800; *Graff v. Buchanan*, 46 Minn. 254, 48 N. W. Rep. 915; *Bronson v. Herbert*, 95 Mich. 478, 55 N. W. Rep. 359; *McCormick Harvesting Mach. Co. v. Richardson* (Iowa) 56 N. W. Rep. 682. And see post, pp. 40-50.

<sup>24</sup>Ante, p. 4. Suppose A. makes an offer by letter to B. to sell him certain goods at a certain price, and B., not knowing of the offer, makes an offer by letter to A. to buy the goods at that price, and the letters cross each other. This is not sufficient to constitute a contract, for there is no acceptance by either of the other's offer, though it may be said that the minds of the parties are *ad idem*. See *Tinn v. Hoffman*, 29 L. T. (N. S.) 271.

<sup>25</sup>*Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. Rep. 669; *Milchers v. Springs*, 33 S. C. 279, 11 S. E. Rep. 788.

<sup>26</sup>Poth. Obl. p. 1, c. 1, § 1, art. 2.

seal, binds the party making it to the extent that he cannot revoke it, but it does not constitute a binding promise or contract until it has been accepted. It is simply an irrevocable offer until accepted or rejected. Acceptance is necessary to turn it into a contract. Another apparent exception is where the party making an offer does so in such a way as to waive the necessity for communication to him of the fact of its acceptance. In such a case communication only of the acceptance is dispensed with, and acceptance is just as necessary as in other cases.

### CHARACTER, MODE, PLACE, AND TIME OF ACCEPTANCE.

**19. The acceptance of an offer to result in a contract must be—**

- (a) **Absolute and unconditional.**
- (b) **Identical with the terms of the offer.**
- (c) **In the mode, at the place, and within the time expressly or impliedly required by the offer.**

In order that the acceptance of an offer may result in a binding contract, it must be absolute, and identical with the terms of the offer; or, as it has been expressed, "an acceptance to be good must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand."<sup>27</sup>

<sup>27</sup> Knowlton's Anson, Cont. 22, note; *Ellason v. Henshaw*, 4 Wheat. 225; *Martin v. Northwestern Fuel Co.*, 22 Fed. Rep. 596; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Thomas v. Greenwood*, 69 Mich. 215, 37 N. W. Rep. 185; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. Rep. 37; *Jordan v. Norton*, 4 Mees. & W. 155; *Fox v. Turner*, 1 Ill. App. 153; *Corcoran v. White*, 117 Ill. 118, 7 N. E. Rep. 525; *Siebold v. Davis*, 67 Iowa, 500, 25 N. W. Rep. 778; *Stagg v. Compton*, 81 Ind. 171; *Eads v. City of Carondelet*, 42 Mo. 113; *Bruner v. Wheaton*, 46 Mo. 363; *Corser v. Hale*, 149 Pa. St. 274, 24 Atl. Rep. 285; *Powers v. Curtis*, 147 Pa. St. 340, 23 Atl. Rep. 450; *Wilkin Manuf'g Co. v. Lumber Co.*, 94 Mich. 158, 53 N. W. Rep. 1045; *Langellier v. Schaefer* (Minn.) 31 N. W. Rep. 690; *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. Rep. 1136. See, also, the cases cited in following notes.

As to acceptance by a person other than the one to whom the offer was made, see post, p. 293.

Unless this is so, there is no meeting of minds and expression of one and the same common intention. The intention expressed by one of the parties is either doubtful in itself, or is different from that of the other, and, as we have seen in discussing the nature of agreement as an element in contract, there must be neither doubt nor difference. The intention of the parties must be distinct and common to both.<sup>28</sup>

If a person offers to do a definite thing, and the person to whom the offer is made accepts conditionally, or introduces a new term into the acceptance, his answer is not a good acceptance, so as to bind the proposer. It is either a mere expression of willingness to treat, or it is in effect a counter offer or proposal which must be accepted by the original proposer before it can result in a binding contract.<sup>29</sup>

If a person proposes to sell another property, and the latter accepts "subject to the terms of a contract being arranged" between their solicitors, there is no agreement, for the acceptance is not final, but subject to a discussion to take place between the agents of the parties.<sup>30</sup> An acceptance, to be effective, must leave nothing to be afterwards agreed upon, but must meet the offer absolutely, and close with it as it stands. If anything is left for future arrangement, the parties have not agreed.<sup>31</sup> It is not to be

<sup>28</sup>Ante, p. 4.

<sup>29</sup>*Hough v. Brown*, 19 N. Y. 111; *Briggs v. Sizer*, 30 N. Y. 647; *Borland v. Guffy*, 1 Grant (Pa.) 394; *Harlow v. Curtis*, 121 Mass. 320; *Maclay v. Harvey*, 90 Ill. 525; *Slaymaker v. Irwin*, 4 Whart. (Pa.) 369; *Hammond v. Winchester*, 82 Ala. 470, 2 South. Rep. 892; *Crabtree v. St. Paul Opera-House Co.*, 39 Fed. Rep. 746; *Hubbell v. Palmer*, 76 Mich. 441, 43 N. W. Rep. 442; *Bristol Aerated Bread Co. v. Maggs*, 44 Ch. Div. 618; *Lancaster v. Elliott*, 42 Mo. App. 503; *Robertson v. Tapley*, 48 Mo. App. 239; *Crossley v. Maycock*, 18 Eq. 180; *Mygatt v. Tarbell*, 85 Wis. 457, 55 N. W. Rep. 1031; *Sanders v. Fruit Co.*, 25 N. Y. Supp. 257; *Putnam v. Grace* (Mass.) 37 N. E. Rep. 166.

If so accepted by the original proposer, it becomes a binding promise. *Esmay v. Gorton*, 18 Ill. 483.

<sup>30</sup>*Honeyman v. Marryat*, 6 H. L. Cas. 112. It seems that an acceptance of an offer to sell land, "subject to the title being approved by" the acceptor's attorneys, is not conditional. *Hussey v. Horne-Payne*, 4 App. Cas. 311, 8 Ch. Div. 670.

<sup>31</sup>*Martin v. Northwestern Fuel Co.*, 22 Fed. Rep. 596; *Appleby v. Johnson*, L. R. 9 Q. P. 158; *Bank of Columbia v. Hagner*, 1 Pet. 455; *Utley v. Don-*



understood from this that there must be nothing at all to be done after the acceptance, but simply that there must be nothing to be agreed upon. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed;<sup>32</sup> but the parties must be fully agreed, and must intend the agreement to be binding. If, though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared and signed, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.<sup>33</sup>

An offer to sell a specified quantity of goods cannot be made binding on the proposer by ordering a less quantity, for the acceptance varies from the offer in respect of quantity; there is no offer to sell any quantity greater or less than that specified.<sup>34</sup> And the same is true where the offer is to sell a certain quantity each of several articles, and the person to whom the offer is made orders the specified quantity of one or more of them, but declines the others.<sup>35</sup> Nor will an order of a certain quantity of goods, accepted by sending a less quantity, impose any liability for the goods sent.<sup>36</sup> So, also, if a person proposes to sell land to another for a certain

aldson, 94 U. S. 29; *First Nat. Bank v. Hall*, 101 U. S. 43; *Brown v. N. Y. Central R. Co.*, 44 N. Y. 79; *Canton Co. v. North. Cent. R. Co.*, 21 Md. 383, at page 396; *First Nat. Bank v. Clark*, 61 Md. 400; *Bruce v. Bishop*, 43 Vt. 159; *Carr v. Duval*, 14 Pet. 77; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. Rep. 10; *Sparks v. Pittsburgh Co.* (Pa. Sup.) 28 Atl. Rep. 152; *Stanley v. Dowdeswell*, L. R. 10 Q. P. 102. And see post, p. 61.

<sup>32</sup> *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Bolton v. Lambert*, 41 Ch. Div. 255; *Bonnewell v. Jenkins*, 8 Ch. Div. 70, 73; *Cheney v. Eastern Transp. Line*, 59 Md. 557; *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. Rep. 869; *Lawrence v. Milwaukee*, L. S. & W. R. Co., 84 Wis. 427, 54 N. W. Rep. 797.

<sup>33</sup> *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Winn v. Bull*, 7 Ch. Div. 29; *Wills v. Carpenter*, 75 Md. 80, 25 Atl. Rep. 415; *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494.

<sup>34</sup> *Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U. S. 149, 7 Sup. Ct. Rep. 168.

<sup>35</sup> *Thomas v. Greenwood*, 69 Mich. 215, 37 N. W. Rep. 195.

<sup>36</sup> *Bruce v. Pearson*, 3 Johns. (N. Y.) 534. As to implied contract from retaining and using or consuming the goods so sent, see ante, p. 26, and note 5

sum, and the latter replies that he will give a less sum, there is nothing binding between the parties.<sup>37</sup> Again, if a person writes another, offering to buy a horse without saying anything as to delivery, and the latter replies that he may have it "if he will come for it," there is no contract;<sup>38</sup> and the same is true where, in case of an offer to sell land, which says nothing as to the place of payment, the acceptance specifies that payment shall be made at the acceptor's place of residence, since, under the offer, the proposer would be entitled to payment at his place of residence.<sup>39</sup>

*Manner, Place, and Time of Acceptance.*

It is also essential that the acceptance shall be made in the manner, at the place, and within the time expressly or impliedly designated in the offer. The proposer has the right to dictate terms in respect to the time, place, and manner of acceptance; and when he does so, like all other terms, they must be complied with. In a leading case on this point the defendant offered to buy flour from the plaintiffs, stating in his offer that the answer should be sent by return of the wagon which brought the offer. The plaintiffs, instead of sending their acceptance by the wagon, mailed it to the defendant at a place other than the destination of the wagon, where it was duly received by him. It was held, however, that he was not bound by the acceptance, as it was not sent to the place prescribed.<sup>40</sup> If an offer asks that the answer be sent by the messenger who brings the offer, or by mail, or by telegraph, it must be so sent, to be effective.<sup>41</sup> An answer required to be sent by messen-

<sup>37</sup> *Hyde v. Wrench*, 3 Beav. 336. And see post, p. 53, and cases cited.

<sup>38</sup> *Fenno v. Weston*, 31 Vt. 345.

<sup>39</sup> *Baker v. Holt*, 56 Wis. 100, 14 N. W. Rep. 8; *Northwestern Iron Co. v. Melde*, 21 Wis. 474; *Sawyer v. Brossart*, 67 Iowa, 678, 25 N. W. Rep. 876; *Gilbert v. Baxter*, 71 Iowa, 327, 32 N. W. Rep. 364; *Langellier v. Schaefer* (Minn.) 31 N. W. Rep. 690; *Robinson v. Weller*, 81 Ga. 704, 8 S. E. Rep. 447; *Maynard v. Tabor*, 53 Me. 511. Merely to inquire, however, how the acceptor of the offer shall remit payment, does not render the acceptance conditional. *Clark v. Dales*, 20 Barb. (N. Y.) 42.

<sup>40</sup> *Eliason v. Henshaw*, 4 Wheat. 228. Where a person residing in one state makes a written offer to a person residing in another, and at a distance, to sell lands, without arranging for a personal meeting, an acceptance by mail is authorized. *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. Rep. 555.

<sup>41</sup> *Carr v. Duval*, 14 Pet. 83. Putting a letter of acceptance in the private

ger will be of no effect if sent by mail or telegraph; nor will an answer by mail be sufficient if the telegraph is the mode prescribed. An acceptance by telegraph, however, or by a messenger dispatched at once where the parties are in the same town, would possibly be sufficient, even though the offer calls for an answer by mail, as it would reach the proposer before a letter could reach him; but this is doubtful, for the proposer is the judge of the importance of his stipulations. An offer by mail, which says nothing as to the mode of sending the answer, impliedly requires an answer by mail, or possibly authorizes one by telegraph,<sup>42</sup> though an acceptance sent by any other mode, and reaching the proposer within a reasonable time, might be held sufficient.<sup>43</sup> An offer by telegraph impliedly requires an answer by telegraph, and an answer by mail will not be sufficient.

If the offer specifies a time for acceptance, it is a term of the offer, and must be complied with. An acceptance after the specified time will have no effect.<sup>44</sup> An offer by correspondence, for instance, calling for an answer "in course of post;" or "by return mail," must be accepted by return mail,<sup>45</sup> though it has been held that an answer mailed on the same day the offer is received, but not by the first

letter box of the proposer has been held sufficient. *Howard v. Daly*, 61 N. Y. 362. As to what constitutes mailing a letter, see post, p. 45, note 61.

\* *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Vassar v. Camp*, 11 N. Y. 441; *Taylor v. Merchants' F. Ins. Co.*, 9 How. 390; *Wilcox v. Cline*, 70 Mich. 517, 88 N. W. Rep. 555; *Trevor v. Wood*, 38 N. Y. 307.

\* *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. Rep. 441.

\* *Longworth v. Mitchell*, 26 Ohio St. 834; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Britton v. Phillips*, 24 How. Pr. (N. Y.) 111; *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. Rep. 213; *Union Nat. Bank v. Miller*, 106 N. C. 347, 11 S. E. Rep. 321; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. Rep. 743; *Cummings v. Town of Lake Realty Co.* (Wis.) 57 N. W. Rep. 43. And see *Park v. Whitney*, 148 Mass. 278, 19 N. E. Rep. 161.

\* *Dunlop v. Higgins*, 1 H. L. Cas. 387; *Carr v. Duval*, 14 Pet. 83; *MacLay v. Harvey*, 90 Ill. 525; *Averill v. Hedge*, 12 Conn. 424; *Tinn v. Hoffman*, 29 Law T. (N. S.) 271. If the delivery of a letter containing an offer is delayed through the sender's fault, or, it may no doubt be, without the fault of either party, an acceptance as soon as the letter is received is in time. It is by return mail. See *Leake*, Cont. 18; *Adams v. Lindsell*, 1 Barn. & Ald. 681.

return mail, is in time.<sup>46</sup> Whatever may be the effect of this case as dispensing with a strict compliance with the offer in such cases, it may safely be said that any substantial delay will be fatal, even where an answer by "return mail" is not requested. An acceptance sent three or four days after the receipt of the offer has been held too late, and there seems no reason to doubt that a delay of one day would be equally fatal.<sup>47</sup> If no time for acceptance is specified, then a reasonable time is implied.<sup>48</sup> What is a reasonable time must necessarily depend on the nature of the offer and the circumstances of each particular case. An offer to sell land, for instance, in view of the fact that an examination of the premises and of the title may be desired, would not require as prompt an acceptance as an offer to sell fruit or other perishable property, or property which is subject to sudden changes in value. The circumstances of each case, therefore, must determine what is a reasonable time; and, when the circumstances have been shown, the question is for the court.<sup>49</sup> An offer by mail, it has been said, even though it does

<sup>46</sup> *Palmer v. Phoenix Mut. Life Ins. Co.*, 84 N. Y. 63.

<sup>47</sup> *Taylor v. Rennie*, 35 Barb. (N. Y.) 272; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 435, Fed. Cas. No. 9,635; *MacLay v. Harvey*, 90 Ill. 525; *Ortman v. Weaver*, 11 Fed. Rep. 358; *Dunlop v. Higgins*, 1 H. L. Cas. 357.

<sup>48</sup> *Ramsgate Hotel Co. v. Montefiore*, L. R. 1 Exch. 109; *Ferrier v. Storer*, 63 Iowa, 484, 19 N. W. Rep. 288; *Averill v. Hedge*, 12 Conn. 424; *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. Rep. 441; *Loring v. City of Boston*, 7 Metc. (Mass.) 409; *Sanford v. Howard*, 29 Ala. 684; *Lehigh Valley Coal Co. v. Curtis*, 22 Ill. App. 394; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240. And see cases cited in preceding notes. This has been held to apply to offers of a reward to the public generally by way of advertisement. *Loring v. City of Boston*, 7 Metc. (Mass.) 409. But see post, p. 57.

<sup>49</sup> *Loring v. City of Boston*, 7 Metc. (Mass.) 409; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, Fed. Cas. No. 9,635; *Averill v. Hedge*, 12 Conn. 424; *Morse v. Bellows*, 7 N. H. 549; *Larmon v. Jordan*, 56 Ill. 204; *Ramsgate Hotel Co. v. Montefiore*, L. R. 1 Exch. 109; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. Rep. 869; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. Rep. 88; *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. Rep. 441; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240. See, also, *Mizell v. Burnett*, 4 Jones, L. (N. C.) 249; *Martin v. Black*, 21 Ala. 721; *Sanford v. Howard*, 29 Ala. 684; *Ferrier v. Storer*, 63 Iowa, 484, 19 N. W. Rep. 288; *Keck v. McKinley*, 98 Pa. St. 616; *McCurdy v. Rogers*, 21 Wis. 189; *Crabtree v. St. Paul Opera-House Co.*, 30 Fed. Rep. 746.

not call for an answer by return mail, impliedly requires an immediate reply, and any substantial delay is fatal; but even in these cases it is believed that the answer may be sent within a reasonable time, and that the circumstances of each particular case must determine what is a reasonable time. An offer by telegraph, specifying no time for answer, would, from the manner in which it is sent, require an immediate reply by telegraph.

### EFFECT OF ACCEPTANCE.

20. Acceptance of an offer from the moment it is communicated turns the offer into a binding promise, and is itself irrevocable.

21. If the proposer prescribes, or expressly or impliedly authorizes, the dispatch of an acceptance by means wholly or partly beyond the acceptor's control, such as the post office, telegraph, or agent of the proposer, an acceptance so dispatched

- (a) Is complete as against the proposer from the time of its dispatch out of the acceptor's control, and
- (b) Is effectual notwithstanding any miscarriage or delay in its transmission, happening after such dispatch, without any fault on the part of the acceptor.

**EXCEPTIONS**—(1) Where it is expressly or impliedly stipulated that there shall be no contract until the acceptance is received by the proposer, its receipt is necessary.

- (2) In Massachusetts it is held that an acceptance is not communicated until it is received.

22. An offer, in the absence of anything to show the contrary, impliedly authorizes acceptance by the same means which brought the offer.

An offer, as we shall presently see, can be revoked at any time before acceptance, for until then there is no agreement; but it cannot be revoked afterwards. Acceptance, whether by words or by

conduct,—as, for instance, by performance of services,—supplies the element of agreement, which binds the party making it to a fulfillment of its terms.<sup>50</sup> It changes the character of the offer, and makes it a promise; and it must needs be irrevocable, since, if the parties are ever to be bound at all, it must be from the moment when they both become aware of their common intention.<sup>51</sup> It is therefore very important to ascertain the moment when an acceptance is to be deemed communicated; and, though this is not difficult, except as a question of fact, when the contract is formed by spoken words or conduct, difficulties have arisen where contracts have been made by correspondence. It is now virtually settled, however, that the acceptance in the case of contracts by correspondence is complete as soon as the acceptor has done all in his power to communicate his intention; in other words, acceptance by letter or telegraph is communicated from the moment it is dispatched.<sup>52</sup>

<sup>50</sup> *Harris' Case*, L. R. 7 Ch. App. 587; *Thruston v. Thornton*, 1 Cush. (Mass.) 91; *Bowen v. Tipton*, 64 Md. 275, at page 289, 1 Atl. Rep. 861; *Equitable Endowment Ass'n v. Fisher*, 71 Md. 430, 18 Atl. Rep. 808; *Fried v. Royal Ins. Co.*, 50 N. Y. 243; *White v. Baxter*, 71 N. Y. 254; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339; *Wheeler v. New Brunswick & C. R. Co.*, 115 U. S. 29, 5 Sup. Ct. Rep. 1061; *Hawkinson v. Harmon*, 69 Wis. 551, 35 N. W. Rep. 28; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. Rep. 555. A bid at an auction sale is accepted when the hammer is struck down, and the contract is then complete. *Payne v. Cave*, 3 Term R. 148; *Blossom v. Milwaukee & C. Ry. Co.*, 3 Wall. 196; *Ives v. Tregent*, 29 Mich. 390. Where an offer is made containing conditions, an acceptance without qualification is an acceptance of the conditions, and makes a binding contract. *Lawrence v. Milwaukee, L. S. & W. Ry. Co.*, 84 Wis. 427, 54 N. W. Rep. 797.

<sup>51</sup> See *Gartner v. Hand*, 86 Ga. 558, 12 S. E. Rep. 878.

<sup>52</sup> *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Potter v. Sanders*, 6 Hare, 1; *Lery v. Cohen*, 4 Ga. 1; *Taylor v. Merchants' F. Ins. Co.*, 9 How. 300; *Averill v. Hedge*, 12 Conn. 424; *Vassar v. Camp*, 11 N. Y. 441; *Darlington v. Forte*, 16 Fed. Rep. 646; *Thomson v. James*, 18 Dunl., B. & M. 1; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, Fed. Cas. No. 9,635; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Harris' Case*, L. R. 7 Ch. 587; *Trevor v. Wood*, 36 N. Y. 307; *Wheat v. Cross*, 31 Md. 99, 103; *Ferrier v. Storer*, 63 Iowa, 484, 19 N. W. Rep. 288; *Stockham v. Stockham*, 32 Md. 196; *Moore v. Pierson*, 6 Iowa, 279; *Perry v. Mount Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632; *Calhoun v. Atchison*, etc., 4 Bush (Ky.) 261; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339; *Abbott v. Shepard*, 48 N. H. 14;

An acceptance, once dispatched, is irrevocable, for the contract has been made; and, for the same reason, from that moment of time the offer is irrevocable.

If no contract could arise until the proposer's receipt of the acceptance, then no contract could ever be completed by post, for, if the proposer could not be held bound by his offer, when accepted, till his receipt of the acceptance, then the acceptor could not be held bound until he should receive notice of the receipt of and assent to his acceptance; and so it might go on ad infinitum.<sup>53</sup> In the case of offers by post it is said that the proposer must be considered in law as making the same identical offer during every instant of the time his letter is traveling, and the contract is concluded by its acceptance; and in a leading case on this point it was held that, if the proposer misdirects his letter calling for a reply by return mail, so that it does not reach the person to whom it is sent for several days, the offer is nevertheless open, and subject to acceptance, when the letter is received.<sup>54</sup>

The party sending an offer by mail, and prescribing no particular mode or means of conveying the acceptance, makes the post office his agent, not only for conveying the offer, but also for conveying the acceptance; and, "as soon as the letter of acceptance is delivered to the post office, the contract is as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance."<sup>55</sup> If the acceptor were to send his acceptance by his own agent or messenger, instead of by one impliedly or expressly authorized by the proposer, the receipt of the acceptance would be necessary to conclude the contract.<sup>56</sup> It is, of course, permissible for a person in making an offer to stipulate expressly or impliedly that it shall not become binding until the ac-

Hunt v. Higman, 70 Iowa, 406, 30 N. W. Rep. 769; Kempner v. Cohn, 47 Ark. 519, 1 S. W. Rep. 869; Cobb v. Foree, 38 Ill. App. 253. Contra, McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278.

<sup>53</sup>Adams v. Lindsell, *supra*.

<sup>54</sup>Adams v. Lindsell, *supra*.

<sup>55</sup>Household Ins. Co. v. Grant, 4 Exch. Div. 221.

<sup>56</sup>Hebb's Case, L. R. 4 Eq. 9.

ceptance is received, and in this case the mailing of the letter of acceptance or delivery of the telegram to the telegraph company does not conclude the contract.<sup>87</sup>

There was at first some hesitation in applying this rule in cases where the letter or telegram of acceptance was lost or delayed in transmission; but it is now settled by the great weight of authority that, when an acceptance has been posted or delivered to the telegraph company, the contract is complete, and cannot be affected by the subsequent fate of the letter or telegram.<sup>88</sup> "The acceptor," it has been said, "in posting the letter has 'put it out of his control, and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound.' How, then, can a casualty in the post, whether resulting in delay—which in commercial transactions is often as bad as no delivery—or in nondelivery, unbind the parties or unmake the contract?"<sup>89</sup> This rule, of course, does not apply where the offer expressly or by implication stipulates that the contract is to be complete, and the offer binding, when the acceptance is received. In such a case the mailing of the acceptance is not enough.<sup>90</sup> To constitute an acceptance, however, the letter must be actually and properly posted. If it is delivered to an agent of the acceptor, and he neglects to mail it, or if it is posted without a stamp, or improperly addressed, it is not an acceptance.<sup>91</sup>

<sup>87</sup> *Lewis v. Browning*, 130 Mass. 173; *Haas v. Myers*, 111 Ill. 421; *Vassar v. Camp*, 11 N. Y. 441.

<sup>88</sup> *Household Ins. Co. v. Grant*, 4 Exch. Div. 221; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Tayloe v. Merchants' F. Ins. Co.*, 9 How. 390; *Washburn v. Fletcher*, 42 Wis. 152; *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 N. Y. 307; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Bryant v. Booze*, 55 Ga. 438; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, Fed. Cas. No. 9,635; *Howard v. Daly*, 61 N. Y. 302; *Duncan v. Topham*, 8 O. B. 225. See, contra, *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *British & Am. Tel. Co. v. Colson*, L. R. 6 Exch. 108. The latter case was disapproved in *Harris' Case*, *supra*.

<sup>89</sup> *Household Ins. Co. v. Grant*, 4 Exch. Div. 221; *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. 691.

<sup>90</sup> *Vassar v. Camp*, 11 N. Y. 441; *Lewis v. Browning*, 130 Mass. 173; *Haas v. Myers*, 111 Ill. 421.

<sup>91</sup> *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 Sup. Ct. Rep. 691; *Maclay v. Harvey*, 90 Ill. 525; *Blake v. Hamburg Ins. Co.*, 67 Tex. 100, 2 S. W. Rep. 368. Deposit of a letter in a street letter box is



On principle and reason it would seem that an intended acceptance may be revoked or recalled at any time before it becomes binding, but not afterwards. If the acceptance is on its way by means of the acceptor's agent,—as, for instance, where he sends his own messenger with it,—or if the offer has stipulated that it shall not become a binding promise until the acceptance is received, the acceptance will not become binding until it is received by the proposer, and it would seem that it may be recalled at any time before its receipt by him. Where, however, the acceptance is by the express or implied authority of the proposer sent by mail, or is sent by the proposer's messenger, so that it becomes binding as soon as it is dispatched, and turns the offer into a contract, it would seem that it cannot be revoked, even before it actually reaches the proposer.<sup>22</sup> This must necessarily be so, for, if it could be otherwise, the proposer might be bound while the acceptor is not; and nothing is better settled in the law of contract than the rule that both parties must be bound or neither is bound.

#### REVOCATION OF OFFER.

23. Until the moment of acceptance, an offer may be revoked, and a subsequent acceptance will be inoperative, except that—

**EXCEPTION**—An offer under seal cannot be revoked at common law.

24. Notice of revocation must be communicated, to prevent an acceptance from being effective.

25. The moment of communication of a revocation, unlike the moment of communication of acceptance, is the moment of its receipt, and not the moment of its dispatch.

26. An unaccepted offer, though coupled with a promise to keep it open for acceptance for a certain time, may nevertheless be revoked before the time has expired, if the promise is without a consideration.

equivalent to deposit in the post office. *Wood v. Callaghan*, 61 Mich. 402, 28 N. W. Rep. 162.

<sup>22</sup> On this point, see *Commercial Ins. Co. v. Hallock*, 27 N. J. Law, 645.

Since an offer, unaccepted, creates no rights, and is not binding on the party making it, it follows that it may be revoked at any time before acceptance.<sup>63</sup> An order, for instance, given to the agent of the party to whom it is made, who has no authority to accept it, is a mere proposal, and revocable at any time before his principal accepts it; and it is immaterial that the order recites that it is taken with the understanding that it is positive, and not subject to change or countermand.<sup>64</sup> Where an offer is made to several persons, it must be accepted by all of them before it becomes binding on the proposer, for an acceptance by less than all is not a compliance with the terms of the offer; and it necessarily follows that such an offer may be revoked at any time before it is accepted by all.<sup>65</sup>

*Offer under Seal.*

At common law there is an exception to this general rule in the case of offers under seal. An offer made under seal cannot be revoked at common law, though this has been changed by statute in many jurisdictions. Even though uncommunicated to the party to whom it is intended to be made, it remains open for his acceptance when he becomes aware of it. Where, for instance, a policy of marine insurance, "signed, sealed, and delivered" by the insurers, had never been accepted by the insured, but had remained in the insurer's office until the loss of the vessel covered by it, it was

<sup>63</sup> *Payne v. Cave*, 3 Term R. 148; *Quick v. Wheeler*, 78 N. Y. 300; *Houghton v. Boisauvin*, 18 N. J. Eq. 315; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. Rep. 4; *Wheat v. Cross*, 31 Md. 99; *Boston & M. R. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Weiden v. Woodruff*, 38 Mich. 130; *Larmon v. Jordan*, 56 Ill. 204; *Afford v. Davies*, 12 O. B. (N. S.) 748; *Countess of Dunmore v. Alexander*, 9 Shaw, D. & B. 190; *Crocker v. New London, W. & P. R. R. Co.*, 24 Conn. 249; *Martin v. Hudson*, 81 Cal. 42, 22 Pac. Rep. 292; *Fraser v. Small* (Sup.) 13 N. Y. Supp. 468; *Miller v. Donville*, 45 La. Ann. 214, 12 South. Rep. 132; *Eskridge v. Glover*, 5 Stew. & P. (Ala.) 264; *Tucker v. Lawrence*, 56 Vt. 467. As a bid at an auction sale is not accepted until the hammer is knocked down, it may be withdrawn before that time. *Payne v. Cave*, 3 Term R. 148; *Ives v. Tregent*, 29 Mich. 390.

<sup>64</sup> *National Refining Co. v. Miller*, 1 S. D. 548, 47 N. W. Rep. 962. And see *Challenge, etc., Mill Co. v. Kerr*, 93 Mich. 328, 53 N. W. Rep. 555; *Harvey v. Duffey*, 99 Cal. 897, 33 Pac. Rep. 897.

<sup>65</sup> *Burton v. Shotwell*, 13 Bush (Ky.) 271.

held that the assent of the assured was not necessary to entitle him, when he became aware of the loss of the ship, to the benefit of the policy. "It is clear on the authorities," it was said, "as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though of course, if he has not previously assented to the making of the deed, the obligee may refuse it."<sup>66</sup> The position of the parties in such a case is anomalous. There can be no agreement, for there is no mutual assent. He who has made and delivered the deed has merely made an offer which he may not revoke, but which is not a contract until assented to by the party to whom it is made.

*Communication of Revocation.*

The general rule above stated would seem too plain for further discussion; but difficult questions have arisen in its application, particularly in its application to offers made by correspondence, and these difficulties have given rise to rules which we must now consider.

Revocation, like offer and acceptance, must be communicated, to have any effect; and here we must note a difference in the meaning of the word "communication" as applied to acceptance and its meaning as applied to revocation. As we have seen, an acceptance is communicated at the moment it is dispatched. A revocation, on the contrary, is not communicated until the moment it is received. A person, therefore, who has accepted an offer not known by him to have been revoked, may safely act on the footing that the offer and acceptance constitute a contract binding on both parties. A person who has received an offer by post or telegraph, and posted or telegraphed his acceptance, has thereby created a binding contract, though notice of revocation of the offer has been mailed or wired to him before his acceptance.<sup>67</sup> The law regards the proposer as mak-

<sup>66</sup> *Xenos v. Wickham*, L. R. 2 H. L. 296; *Butler & Baker's Case*, 3 Coke, 26b. And see *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. Rep. 544.

<sup>67</sup> *Byrne v. Tienhoven*, 5 C. P. Div. 349; *Taylor v. Merchants' F. Ins. Co.*, 9 How. 390; *Patrick v. Bowman*, 149 U. S. 411, 13 Sup. Ct. Rep. 811, 866; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 342; *Thomson v. James*, 18 Dunl. B. & M. 1; *Lungstrass v. German Ins. Co.*, 48 Mo. 201; *Henthorn v. Frazer* [1892] 66 L. T. (N. S.) 439; [1892] 2 Ch. 27; *Harris' Case*, L. R. 7 Ch. App. 587; *Boston & M. R. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Kempner v. Cohn*,

ing his offer during every instant of time that his letter is traveling, and during the period that may be considered as a reasonable time for acceptance. The party to whom the offer is made is therefore entitled to consider that it is still being made, unless he has notice to the contrary, and that his acceptance concludes a binding contract.<sup>47</sup>

The revocation cannot be held to be communicated merely because it has been put in the course of transmission. The post office is used by the proposer as his messenger or agent, not only to take the offer, but also to bring back the acceptance. The acceptance, therefore, is communicated to him when put into the charge of his instrument of communication. His revocation, however, cannot be considered to be communicated until it is received, for it is better to regard the post office or telegraph wire, not as the agent of both parties, but as the messenger employed by the proposer for the purpose of offer and acceptance. This is the reason for the rule. It is true that the minds of the parties are not *ad idem* in the case of a contract concluded by an acceptance dispatched after a revocation has been posted. Where the parties are contracting at a distance from one another the consensus *ad idem* can only be arrived at by some such artificial process as the continuing offer.<sup>48</sup> If, after an offer has been posted, or sent by any other means, the proposer sends a withdrawal by such means that it reaches the person to whom the offer was sent at the same time as the offer, this is a good revocation, and an acceptance of the offer will be ineffectual.<sup>49</sup>

*Agreement to Hold Offer Open—"Refusals" and "Options."*

Where we come to treat of consideration, we will see that a promise, not made under seal, is not binding unless there is a con-

47 Ark. 519, 1 S. W. Rep. 769; Wheat v. Cross, 31 Md. 99; Stockham v. Stockham, 32 Md. 196; Hallock v. Commercial Ins. Co., 26 N. J. Law, 268; Faulkner v. Hebard, 26 Vt. 452; McCotter v. City of New York, 37 N. Y. 325; Weiden v. Woodruff, 38 Mich. 180; Crocker v. New London, W. & P. R. R. Co., 24 Conn. 249; Cobb v. Foree, 38 Ill. App. 255.

<sup>48</sup> Mactier v. Frith, 6 Wend. (N. Y.) 103.

<sup>49</sup> Anson, Cont. 27.

<sup>50</sup> Dunmore v. Alexander, 9 Shaw & D. 190. Suppose, however, the letter containing the offer should be read, and an acceptance dispatched in good

consideration to support it. For this reason it is settled that an offer, though coupled with a promise to hold it open for acceptance for a specified time, may nevertheless be revoked or withdrawn before the time has expired, provided there is no consideration for the promise to hold the offer open.<sup>71</sup> Cases of this kind arise where a person gives another the "refusal" of land or goods for a certain time, or an option to buy.

In these cases there has been some difficulty as to what amounts to a revocation or retraction of the offer, but it is probably settled that a sale of the property to some other person, or any other overt act clearly showing an intention to revoke, is enough, provided the person to whom the offer was made has notice of such acts before he accepts. The revocation need not be communicated, but it is sufficient if he has knowledge of acts clearly indicating an intention to revoke.<sup>72</sup> It is not clearly settled what would be sufficient notice. It might probably be said that the notice must be such as reasonably amounts to knowledge of the acts inconsistent with the continuance of the offer. In case of an offer to sell specific property, actual knowledge of its sale to another would clearly show an intent to revoke, but it is doubtful whether information from a stranger that such a sale has been made, or that the proposer has changed his mind, would be sufficient, as it would scarcely be reasonable to require a man to believe and act on such statements. In the absence of sufficient notice or knowledge of a revocation, the offer, according to the better doctrine and the weight of authority, con-

faith, before the letter containing the withdrawal is opened. It would seem, on principle, that in such a case the acceptance must be effectual.

<sup>71</sup> *Cooke v. Oxley*, 3 Term R. 653 (as to this case, see post, p. 51, note, 74); *Routledge v. Grant*, 4 Bing. 653; *Head v. Diggon*, 3 Man. & R. 97; *Stevenson v. McLean*, 5 Q. B. Div. 351; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Dickinson v. Dodds*, 2 Ch. Div. 463; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. Rep. 669; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284; *Eskridge v. Glover*, 5 Stew. & P. (Ala.) 264; *Larmon v. Jordan*, 56 Ill. 206; *Weiden v. Woodruff*, 38 Mich. 130; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. Rep. 796; *Klee v. Grant*, 4 Misc. Rep. 88, 23 N. Y. Supp. 855; *Connor v. Renneker*, 25 S. C. 514; *Sault Ste. M., L. & I. Co. v. Simons*, 41 Fed. Rep. 835; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. Rep. 743; *McDonald v. Huff* (Cal.) 18 Pac. Rep. 243. Post, p. 168.

<sup>72</sup> *Dickinson v. Dodds*, *supra*; *Coleman v. Applegarth*, *supra*.

tinues open and will be turned into a binding promise by its acceptance.<sup>73</sup> Some courts, however, seem to have held, contrary to reason and principle, that notice of withdrawal is not necessary.<sup>74</sup> Where the parties are dealing with each other at a distance by correspondence, it is the settled law, in these as in other cases, that the offer continues open until notice of its withdrawal is not only sent, but received by the party to whom it was made, and is turned into a binding promise if accepted before receipt of the notice.<sup>75</sup> Knowledge in these cases also may be equivalent to notice sent and received.

If the promise to keep an offer open for a specified time is sup-

<sup>73</sup> *Boston & M. R. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224, 225; *Great Northern R. Co. v. Witham*, L. R. 9 C. P. 16; *Eskridge v. Glover*, 5 Stew. & P. (Ala.) 264; *Houghwout v. Bolsaubin*, 18 N. J. Eq. 318; *Henthorn v. Frazer* [1892] 66 L. T. (N. S.) 439, 2 Ch. 27; *Cheney v. Cook*, 7 Wis. 413; *School Directors v. Trefethren*, 10 Ill. App. 127; *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. Rep. 464; *Wall v. Minneapolis, St. P. & S. S. M. R. Co.* (Wis.) 56 N. W. Rep. 367. And see *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. Rep. 389. See, also, post, p. 168.

<sup>74</sup> *Tucker v. Woods*, 12 Johns. (N. Y.) 190; *Bean v. Burbank*, 16 Me. 458; *Gillespie v. Edmunston*, 11 Humph. (Tenn.) 553. And see *Cooke v. Oxley*, 3 Term R. 653. This case has been very much criticised and disapproved in so far as it seems to hold that, where an offer gives a specified time within which it may be accepted, an acceptance within that time without notice that the offer has been revoked, does not bind; that is to say, that notice of the revocation is not necessary. If the case was intended to go this far, it is not considered as authority in this country. *Boston & M. R. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224. Nor, it seems, is it followed, even in England, to such an extent as we have suggested. Indeed, a later English case says: "All that *Cooke v. Oxley* affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. . . . The offer may be revoked before acceptance. If the offer is not retracted, it is in force as a continuing offer till the time of accepting or rejecting it has arrived." *Stevenson v. McLean*, 5 Q. B. Div. 351. If the case of *Cooke v. Oxley* merely decides that an offer, coupled with a promise to keep it open for a specified time, may be revoked, to the knowledge of the other party, before the time has expired, where there is no consideration for the promise to keep it open, it is in accord with the law in this country, and with the later decisions in England.

<sup>75</sup> *Hamilton v. Lycoming Ina. Co.*, 5 Pa. St. 339; *Larmon v. Jordan*, 56 Ill. 204; *Averill v. Hedge*, 12 Conn. 434; *Moore v. Pierson*, 6 Iowa, 278. Ante, pp. 42-44.

ported by a valid consideration,—as, for instance, where a small sum of money is paid for the option or refusal,—the promise constitutes a contract in itself, and, of course, is binding.<sup>16</sup> A failure to keep the offer open would be a breach of contract for which an action would lie for damages, though it seems that it could not be the subject of a suit for specific performance.

#### LAPSE OF OFFER.

**27.** An offer will lapse, and so be determined without express revocation, so that a subsequent acceptance will have no effect—

- (a) On the efflux of a time specified for acceptance;
- (b) On the efflux of a reasonable time where no time is specified;
- (c) On its rejection;
- (d) On failure of the acceptance to comply with the terms of the offer, which is equivalent to rejection;
- (e) On the death or insanity of either party before acceptance;
- (f) Where one of the parties is a partnership, by its dissolution before acceptance, and notice thereof where it was the proposer;
- (g) Possibly by other material changes in the circumstances of the parties.

An offer may lapse and be determined by the efflux of a specified time for acceptance. If a person should offer to sell goods "if the offer is accepted by" a certain day, an acceptance after that time would have no effect. After the specified time has passed without acceptance, the offer lapses, or is determined without any further action on the part of the proposer, and it is no longer open for acceptance.<sup>17</sup> Where the party making the offer has not prescribed or specified a time within which it may be accepted, the offer is de-

<sup>16</sup> *Grabenhorst v. Nicodemus*, 42 Md. 236; *Stitt v. Huldekopers*, 17 Wall. 384; *Bradford v. Foster* (Tenn.) 9 S. W. Rep. 195.

<sup>17</sup> *Ante*, p. 40, and cases cited in notes 44, 45.

terminated by the lapse of a reasonable time without acceptance.<sup>70</sup> What is a reasonable time must necessarily depend, as we have already shown, on the nature of the offer and the circumstances of the particular case.<sup>71</sup>

The rejection or refusal of an offer by the person to whom it is made causes the offer to lapse, and it cannot be turned into a binding promise by a subsequent change of mind and acceptance. In order that an acceptance may be effective after a refusal, the offer must have been renewed by the proposer.<sup>72</sup>

So, also, a failure to comply with a condition of the offer as to the mode of acceptance, or an acceptance conditionally, or on terms varying from those offered, will cause the offer to lapse, for this is, in effect, a rejection of the offer.<sup>73</sup> Thus, where a person offered to sell land at a certain sum, and the person to whom the offer was made replied that he would give a less sum, and afterwards, when this was refused, and when the proposer was no longer willing to adhere to his original proposal, sought to bind him by accepting at the sum first asked, it was held that the proposal to buy at a less

<sup>70</sup> *Ramsgate Hotel Co. v. Montefiore*, 1 Exch. 109; *Loring v. City of Boston*, 7 Metc. (Mass.) 409; ante, p. 41, and cases cited in notes, 48, 49. Continuing offer. *Sherley v. Peehl*, 84 Wis. 48, 54 N. W. Rep. 267.

<sup>71</sup> Ante, p. 41, and cases cited in note, 49.

<sup>72</sup> *Tinn v. Hoffman*, 29 Law T. (N. S.) 271; *Hyde v. Wrench*, 3 Beav. 834; *Davis v. Parish*, Litt. Sel. Cas. (Ky.) 153; *W. & H. M. Goulding v. Hammond*, 4 C. C. A. 533, 54 Fed. Rep. 639; *Sheffield Canal Co. v. Sheffield & R. Ry. Co.*, 3 Ry. Cas. 121, 132; *Honeyman v. Marryat*, 21 Beav. 14; *Arthur v. Gordon*, 37 Fed. Rep. 558; *Richardson v. Lenhard*, 48 Kan. 629, 29 Pac. Rep. 1076.

<sup>73</sup> *Hyde v. Wrench*, 3 Beav. 836; *First Nat. Bank v. Hall*, 101 U. S. 50; *Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U. S. 149, 7 Sup. Ct. Rep. 168; *Carr v. Duval*, 14 Pet. 77; *Derrick v. Morette*, 73 Ala. 75; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. Rep. 743; *Clay v. Bicketts*, 66 Iowa, 362, 23 N. W. Rep. 755; *Fox v. Turner*, 1 Ill. App. 153; *Cornwells v. Krengel*, 41 Ill. 394; *Johnson v. Stephenson*, 28 Mich. 63; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. Rep. 87; *Iron Works v. Douglas*, 49 Ark. 355; *Northwestern Iron Co. v. Meade*, 21 Wis. 474; *First Nat. Bank v. Clark*, 61 Md. 400; *Crabtree v. Opera-House Co.*, 39 Fed. Rep. 746; *W. & H. M. Goulding v. Hammond*, 4 C. C. A. 533, 54 Fed. Rep. 639.



sum than asked was a refusal of the offer, and a counter proposal, and that the original offer could not, after that, be turned into a promise by acceptance. It was no longer open for acceptance.<sup>82</sup>

The death or insanity of either party before acceptance of an offer causes the offer to lapse.<sup>83</sup> An acceptance communicated to the personal representatives of the proposer after his death cannot bind them; nor can the representatives of the person to whom an offer has been made, and who has since died, bind the proposer by accepting it on behalf of the estate. An offer, as we have said, is considered as continuing up to the time of acceptance, but, if one of the parties dies, then there is no one by whom or to whom, as the case may be, the offer can be considered as being made.<sup>84</sup> The fact that an acceptance is dispatched in ignorance of the proposer's death can make no difference. Since, however, an acceptance by mail takes effect at the moment of its dispatch, the death of the proposer before the receipt of the acceptance, but after it has been mailed, does not cause the offer to lapse, since, before his death, it has been turned into a binding promise by the acceptance.<sup>85</sup>

So, also, the dissolution of a partnership after an offer has been made by the firm, and before its acceptance, with notice thereof to the person to whom the offer was made, revokes the offer;<sup>86</sup> and it would seem that dissolution of a firm to whom an offer is made, before acceptance, must necessarily cause the offer to lapse, as the party to whom the offer was made is no longer in existence.

It is possible that other material changes in the circumstances which existed when the offer was made may cause it to lapse. It has been held, for instance, that an offer to insure a person's life

<sup>82</sup> *Hyde v. Wrench*, *supra*; *Arthur v. Gordon*, 37 Fed. Rep. 558.

<sup>83</sup> *Wallace v. Townsend*, 43 Ohio St. 537, 3 N. E. Rep. 601; *The Palo Alto*, 2 Ware, 343, Fed. Cas. No. 10,700; *Sutherland v. Perkins*, 75 Ill. 338; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Pratt v. Trustees of Baptist Soc.*, 93 Ill. 475; *Holfenstein's Estate*, 77 Pa. St. 328; *Frith v. Lawrence*, 1 Paige (N. Y.) 434; *Blades v. Free*, 9 Barn. & C. 167; *Campanari v. Woodburn*, 15 C. B. 400; *Lee v. Griffin*, 1 Best & S. 272; *Werner v. Humphreys*, 2 Man. & G. 853; *Marr v. Shaw*, 51 Fed. Rep. 860; *Beach v. First M. E. Church*, 96 Ill. 177.

<sup>84</sup> *Frith v. Lawrence*, *supra*; *Pratt v. Trustees*, *supra*.

<sup>85</sup> *Mactier v. Frith*, 6 Wend. (N. Y.) 103.

<sup>86</sup> *Goodspeed v. Wiard Plow Co.*, 45 Mich. 322, 7 N. W. Rep. 902.

lapsed because of an accident which happened to him before acceptance."

### OFFERS TO THE PUBLIC GENERALLY.

28. An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.

In order that an offer may result in a contract it need not be made to a definitely ascertained person. It may be made to any one of the public generally who may accept it, or it may be made to any one of a class of persons who may accept it. These offers are sometimes said to be made "to all the world," but this is not correct.<sup>88</sup> Take, for instance, the case of a proposal by way of advertisement of a reward for the rendering of certain services, addressed to the public at large, such as an advertisement for the return of lost property, or for the apprehension of persons who have committed a crime, or for certain information. This is an offer, to any one who shall accept it, of a promise for an act, and becomes a binding promise to pay the reward as soon as any individual renders the services.<sup>89</sup>

Offers of this character are generally advertisements for such services as we have mentioned, but they are not limited to them.<sup>90</sup>

<sup>88</sup> *Canning v. Farquhar*, 16 Q. B. Div. 727.

<sup>89</sup> See *Spencer v. Harding*, L. R. 5 C. P. 561.

<sup>90</sup> *Wentworth v. Day*, 3 Metc. (Mass.) 352; *Symmes v. Frazier*, 6 Mass. 344; *Bease v. Dyer*, 9 Allen (Mass.) 151; *Loring v. City of Boston*, 7 Metc. (Mass.) 409; *Wilson v. Guyton*, 8 Gill (Md.) 213; *Pierson v. Morch*, 82 N. Y. 508; *First Nat. Bank v. Hart*, 55 Ill. 62; *Montgomery County v. Robinson*, 85 Ill. 174; *Harson v. Pike*, 16 Ind. 140; *Goldsborough v. Cradle*, 28 Md. 477; *Ryer v. Stockwell*, 14 Cal. 134; *Hayden v. Songer*, 56 Ind. 42; *Thruston v. Thornton*, 1 Cush. (Mass.) 91; *Morse v. Bellows*, 7 N. H. 549, at page 563; *Janvrin v. Town of Exeter*, 48 N. H. 83; *Cummings v. Gann*, 52 Pa. St. 484; *Morrell v. Quarles*, 35 Ala. 544. As to the intention to become bound, see post, p. 59, note, 103.

<sup>91</sup> A published time table is an offer by the railroad company to the public generally that, if they will apply for a ticket for carriage, they will be carried as stated in the time table, and the offer is accepted by each person who applies for a ticket. *Denton v. Great Northern R. Co.*, 5 EL. & BL. 860; *Sears v. Eastern R. R. Co.*, 14 Allen (Mass.) 433. The same doctrine has been applied in the case of bounties offered by towns, cities, or counties to any

Sellers of a medicinal remedy, who, to increase their sales, advertise that a certain sum will be paid to any person who buys and uses the remedy, and afterwards contracts the disease it is claimed to prevent, will become bound by contract obligation to any person who purchases and uses the remedy, and he may recover the sum promised if he contracts the disease.<sup>91</sup> So, where a person invites architects to submit designs for a building, stating that all who submit plans shall receive a certain sum, and that the one whose plans are the best shall be engaged as architect and superintendent, he becomes bound to pay the sum specified to all who submit plans, and, if he adjudges one of the plans the best, he becomes bound to make that architect the superintendent and architect of the building.<sup>92</sup>

Nor is it necessary that a general offer shall be by way of advertisement; it may be made orally. Thus, where a person, whose wife was in a burning building, exclaimed to the bystanders generally that he would give a certain sum to any person who would bring out her body, and a man did so, it was held that he could recover the sum promised.<sup>93</sup>

#### *Acceptance and Revocation.*

Offers of this character, though they need not be made to an ascertained person, cannot result in contract obligation until they are accepted by an ascertained person by performing the services. Before the services are rendered, there is merely an offer, which may be revoked, as in the case of other unaccepted offers.<sup>94</sup> An

person who should enlist into the military service of the United States. *Crowell v. Hopkinton*, 45 N. H. 9. As to offers of premiums in horse races, see *Alvord v. Smith*, 63 Ind. 58. Offer by persons purchasing railroad on foreclosure and organizing new company to exchange new stock for old. *Schorestone v. Iselin*, 23 N. Y. Supp. 557. As to general letter of credit as being a general offer resulting in a promise to persons giving credit on the strength of it, see *Ex parte Asiatic Banking Corp.*, 2 Ch. App. 391.

<sup>91</sup> *Carlill v. Carbolic Smoke-Ball Co.* [1892] 2 Q. B. 484, 4 Rep. 176; *Id.* [1893] 1 Q. B. 256.

<sup>92</sup> *Walsh v. St. Louis Exposition & M. H. Ass'n*, 16 Mo. App. 502; 90 Mo. 459, 2 S. W. Rep. 842.

<sup>93</sup> *Reif v. Paige*, 55 Wis. 496, 13 N. W. Rep. 473. And see *Hayden v. Souger*, 56 Ind. 42.

<sup>94</sup> *Harson v. Pike*, 16 Ind. 140; *Freeman v. City of Boston*, 5 Metc. (Mass.) 56; *Cummings v. Gann*, 52 Pa. St. 484.

acceptance by performance of the services after the offer has been withdrawn does not bind the proposer,<sup>95</sup> and it even seems that ignorance of the withdrawal makes no difference, if the withdrawal was as publicly made as the offer.<sup>96</sup> According to the weight of authority, the offer remains open for acceptance until it is actually withdrawn or revoked.<sup>97</sup> To say that any contractual obligation can exist before the services are rendered would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or that a man may have a contract with the whole world; and this, as we have seen, would be contrary to the idea of agreement and of obligation as legal conceptions. Agreement is the expression of a common intention, and there can be no such thing while intention is expressed on one side only. Nor can obligation, in the sense in which it is used in relation to contracts, exist between a definite proposer and the indefinite mass of persons to whom it is open to accept the proposal. Until a definite person has emerged from the mass, and accepted the proposal, it cannot become binding.<sup>98</sup>

*Performance of Services in Ignorance of Offer—Motive.*

Suppose that, in case of an offer by advertisement, and the doing by a person of the acts required, the person performing the service does not know of the offer, or does not realize all its terms, does he in such a case thereby accept the offer and acquire a right to the reward? In a leading English case a reward had been offered by the defendant for information which was supplied by the plaintiff, but not with a view to obtaining the reward. It was held that the defendant was liable as upon a contract concluded by the giving of the information asked for. The report of the case does not show that the plaintiff was unaware of the offer; the only point which seems to have been raised being that the reward was not the motive which induced the plaintiff to supply the information. The court

<sup>95</sup> *Shuey v. U. S.*, 92 U. S. 73; *Biggers v. Owen*, 79 Georgia, 658, 5 S. E. Rep. 193.

<sup>96</sup> *Shuey v. U. S.*, 92 U. S. 73.

<sup>97</sup> *Ryer v. Stockwell*, 14 Cal. 134; *In re Kelly*, 39 Conn. 159. In Massachusetts it is held that the offer, like other offers, lapses after the expiration of a reasonable time. *Loring v. City of Boston*, 7 Metc. (Mass.) 409.

<sup>98</sup> *Anson*, Cont. 31.

held that the motive was immaterial, and that "there was a contract with the person who performed the condition mentioned in the advertisement."<sup>99</sup>

In this country the authorities are conflicting. Some courts have held that the reward cannot be recovered where the person performing the services did so in ignorance of the offer of the reward. "To the existence of a contract," it was said in a New York case, "there must be mutual assent, or, in another form, offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that, there is no contract. How, then, can there be consent or assent to that of which the party has never heard?"<sup>100</sup> Other courts have held that ignorance of the offer does not prevent the person performing the services from recovering.<sup>101</sup> It has even been held, contrary to the English case above mentioned, that the motive in performing the services is material, and that there must be an intent to claim the reward, as well as knowledge that it is offered.<sup>102</sup>

#### OFFER AS REFERRING TO LEGAL RELATIONS.

29. The offer must be intended to create legal relations. Applying this rule a contract does not result from—

- (a) A mere statement of intention, or transactions not in contemplation of legal consequences.
- (b) Transactions intended as a joke or jest.
- (c) Proposals amounting to mere invitations to negotiate.
- (d) Preliminary negotiations, which are not concluded by agreement.

<sup>99</sup> *Williams v. Carwardine*, 4 Barn. & Adol. 621.

<sup>100</sup> *Fitch v. Snedaker*, 38 N. Y. 248; *Howland v. Lounds*, 51 N. Y. 604; *Marvin v. Treat*, 37 Conn. 96; *Stamper v. Temple*, 6 Humph. (Tenn.) 113.

<sup>101</sup> *Dawkins v. Sappington*, 26 Ind. 199; *Russell v. Stewart*, 44 Vt. 170; *Auditor v. Ballard*, 9 Bush. (Ky.) 572; *Eagle v. Smith*, 4 Houst. (Del.) 293; *Crawshaw v. City of Roxbury*, 7 Gray (Mass.) 377; *Everman v. Hyman* (Ind. App.) 28 N. E. Rep. 1022.

<sup>102</sup> *Hewitt v. Anderson*, 56 Cal. 476.

**30. The offer must be capable of creating legal relations, and therefore—**

- (a) It must be definite and certain, or capable of being made certain.
- (b) It must be made by and to a party capable of contracting.
- (c) It must be made in the form prescribed by law.
- (d) If it is to be accepted by the giving of a promise, it must be a consideration for the promise; and, if it is an offer of a promise, the act, forbearance, or promise asked in return must be a consideration.
- (e) The act or forbearance done or contemplated must be lawful.

*Intention to Create Legal Relations.*

In order that an offer or proposal may be turned into a binding contract by acceptance, it must be made in contemplation of legal consequences. A mere statement of intention, for instance, made in the course of conversation, will not result in a binding promise, though acted upon by the party to whom it was made.<sup>103</sup> Thus, where a father said to a man that he would give a certain sum to him who married his daughter with his consent, and the man married her, and sued for the money, it was held that he could not recover, as it was not reasonable that a man "should be bound by general words spoken to excite suitors."<sup>104</sup> Nor will services rendered for another and accepted by him place him under a contrac-

<sup>103</sup> *Week v. Tibold*, Rolle, Abr. 6; *Stamper v. Temple*, 6 Humph. (Tenn.) 113; *Randall v. Morgan*, 12 Ves. 67; *Stagg v. Compton*, 81 Ind. 171; *Erwin v. Erwin*, 25 Ala. 236; *Carson v. Lucas*, 18 B. Mon. (Ky.) 213; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. Rep. 730; *Kirksey v. Kirksey*, 8 Ala. 131; *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, 7 South. Rep. 444; *Thruston v. Thornton*, 1 Cush. (Mass.) 89; *Higgins v. Lessig*, 49 Ill. App. 459. Statements by a married child that she intends to pay her parents for support, made to third persons, result in no contract on her part. *Perkins v. Westcoat* (Colo. App.) 33 Pac. Rep. 139. The rule above stated applies to offers of reward made to the public generally. *Stamper v. Temple*, 6 Humph. (Tenn.) 113; *Higgins v. Lessig*, 49 Ill. App. 459. See, also, *Ulrich v. Arnold*, 120 Pa. St. 170, 13 Atl. Rep. 831.

<sup>104</sup> *Week v. Tibold*, supra. And see *Randall v. Morgan*, supra.

tual obligation to pay for them, where payment therefor was not expected nor intended.<sup>106</sup>

On the same footing stand engagements of pleasure, or agreements which, from their nature, do not admit of being regarded as business transactions. As already stated, we cannot in all cases refuse to recognize such engagements as contracts on the ground that the matter of them is not reducible to a money value. The acceptance of an invitation to dinner, or to play in some pleasure game, forms an agreement in which the parties may incur expense in the fulfillment of their mutual promises. The damages resulting from a breach of the engagement might be ascertainable, but the courts would no doubt hold that, as no legal consequences were contemplated by the parties, no action would lie.<sup>106</sup>

*Same—Jest.*

Transactions intended as a joke or jest cannot result in a contract, for the reason that there is no intention to contract; there is no contemplation of legal consequences.<sup>107</sup>

*Same—Invitations to Deal.*

Offers which, by acceptance, may be turned into binding promises, must be distinguished from offers which merely amount to invitations to deal. In the latter case the offer is not made in contemplation of an acceptance resulting in legal relations, and acceptance will not result in a contract. Illustrations of this arise where mer-

<sup>106</sup> The fact that services are rendered does not create a liability on the part of the person for whom they are rendered, even though done at his request, where the circumstances are such as to repel the inference that compensation was intended; and, when performed merely from kindly or charitable motives, the law will not imply a promise to pay for them. *Oicotte v. Church of St. Anne*, 60 Mich. 552, 27 N. W. Rep. 682. And see *Covel v. Turner*, 74 Mich. 408, 41 N. W. Rep. 1091; *Gross v. Cadwell*, 4 Wash. 670, 30 Pac. Rep. 1052; *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. Rep. 701; *Everitt v. Walker*, 109 N. C. 129, 13 S. E. Rep. 860; *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. Rep. 114. See, also, ante, p. 28, and cases cited.

<sup>106</sup> *Anson*, Cont. 19; ante, p. 8.

<sup>107</sup> *McClurg v. Terry*, 21 N. J. Eq. 225; *Armstrong v. McGhee*, Add. (Pa.) 261; *Keller v. Holderman*, 11 Mich. 248; *Bruce v. Bishop*, 43 Vt. 161. Marriage ceremony performed in jest, but by a person duly authorized. *McClurg v. Terry*, supra.

chants send out circulars offering goods for sale on certain terms, not intending the circular as an offer to become binding on acceptance, but merely as an invitation to persons to enter into negotiations;<sup>108</sup> or where a person, wishing to have work done, or to buy goods, advertises for proposals;<sup>109</sup> or where a person advertises that he will sell goods at auction.<sup>110</sup> The circulars of the merchant, the advertisement for proposals, and the advertisement of the auction sale, are mere declarations of intention. Legal consequences are not directly contemplated, and no contract relation arises with persons who may send an order for goods, or make bids, or attend the auction. The rule is not limited to these particular cases, but applies whenever it is clear that a proposition was intended merely as an invitation to deal, and not as an offer to become binding on acceptance.<sup>111</sup>

*Same—Incomplete Negotiations.*

Similar to these cases are those in which the parties are carrying on negotiations, and have not yet come to an agreement. So long as the negotiations are incomplete, there is no binding contract.<sup>112</sup> Where the parties are merely settling the terms of an

<sup>108</sup> *Spencer v. Harding*, L. R. 5 C. P. 561; *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. Rep. 172; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Knight v. Cooley*, 34 Iowa, 218; *Topliff v. McKendree*, 88 Mich. 148, 50 N. W. Rep. 100; *Allen v. Kirwan* (Pa. Sup.) 28 Atl. Rep. 495; *Smith v. Weaver*, 90 Ill. 392.

<sup>109</sup> *Howard v. Industrial School*, 78 Me. 230, 3 Atl. Rep. 657; *Leskie v. Haselstine*, 155 Pa. St. 98, 25 Atl. Rep. 886; *Topping v. Swords*, 1 E. D. Smith (N. Y.) 609.

<sup>110</sup> *Harris v. Nickerson*, L. R. 8 Q. B. 286.

<sup>111</sup> In *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. Rep. 172, the defendants wrote plaintiff: "We are authorized to offer Michigan fine salt, in full car-load lots of 80 to 95 bbls., delivered at your city, at 85c. per bbl. \* \* \* Shall be pleased to receive your order,"—and the plaintiff at once replied, ordering 2,000 barrels, but the defendants refused to fill the order. The court held that defendants' letter was a simple notice that they were in a condition to supply salt for the price named, and an invitation to deal with them, and not an offer which plaintiff could change into a binding promise by his order. See, also, *Beaupré v. Pacific & A. Tel. Co.*, 21 Minn. 155; *Kinghorne v. Montreal Tel. Co.*, U. C. 18 Q. B. 60; *Lyman v. Robinson*, 14 Allen (Mass.) 254; *Smith v. Gowdy*, 8 Allen (Mass.) 596; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. Rep. 4; *Harvey v. Facey*, 1 Rep. 428; *Id.* [1893] App. Cas. 552. But see *Keller v. Ybarra*, 3 Cal. 147.

<sup>112</sup> *Lyman v. Robinson*, 14 Allen (Mass.) 242; *Schenectady Stove Co. v. Hol-*



agreement into which they propose to enter after all its particulars are adjusted, the negotiations do not amount to an agreement. The terms must be first settled. "An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled."<sup>113</sup>

So, also, if the parties come to an agreement as to terms, but with the intention and upon the understanding that their agreement is to be reduced to writing, and that they are not to be bound until this is done, there is no contract until the writing is drawn up and assented to by both as their agreement. It all depends on the intention of the parties. If they come to a final agreement as to terms, it may bind them, though they intend to reduce the terms into writing for the purpose of becoming bound in a more formal manner, or for the purpose of preserving a memorial of the terms, or for any purpose other than that of making the writing exclusively their agreement.<sup>114</sup> The question is whether they intend legal consequences before the formal written evidence of their agreement is executed. If they do not, there is no contract until this is done; but, if they do intend to be bound without regard to the writing, there is a contract.<sup>115</sup> Whether they intend to make no agree-

brook, 101 N. Y. 45, 4 N. E. Rep. 4; *Bean v. Clark*, 30 Fed. Rep. 225; *Templeton v. Wile* (City Ct. N. Y.) 3 N. Y. Supp. 9; *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494; *Morris v. Brightman*, 143 Mass. 149, 9 N. E. Rep. 512; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. Rep. 796; *Shaw v. Woodbury Glass Works* (N. J. Sup.), 18 Atl. Rep. 696; *Whiteford v. Hitchcock*, 74 Mich. 208, 41 N. W. Rep. 898; *Gates v. Nelles*, 62 Mich. 444, 29 N. W. Rep. 73. And see ante, p. 37.

<sup>113</sup> *Ridgway v. Wharton*, 6 H. L. Cas. 268. And see *Shepard v. Carpenter* (Minn.) 55 N. W. Rep. 906; *Walton v. Mather*, 4 Misc. Rep. 261, 24 N. Y. Supp. 307; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. Rep. 10.

<sup>114</sup> *Leake*, Cont. 98; *Ridgway v. Wharton*, 6 H. L. Cas. 268; *Green v. Cole* (Mo. Sup.) 24 S. W. Rep. 1058; *Lewis v. Brass*, L. R. 3 Q. B. Div. 667; *Crossley v. Maycock*, L. R. 18 Eq. 180. And see ante, p. 38.

<sup>115</sup> *Winn v. Bull*, 2 Ch. Div. 29; *Fowle v. Freeman*, 9 Ves. 351; *Gibbins v. Asylum District*, 11 Beav. 1; *Heyworth v. Knight*, 17 C. B. (N. S.) 298; *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494; *Allen v. Chouteau*, 102 Mo. 300, 14 S. W. Rep. 869; *Hodges v. Sublett*, 91 Ala. 588, 8 South. Rep. 800;

ment until the writing is drawn up, or whether they intend to make a perfect agreement to be afterwards reduced into writing, is a question of fact; but the circumstance that they do intend a subsequent writing to be drawn up is said to be strong evidence that they do not intend to be bound by the preliminary agreement as to terms.<sup>116</sup>

*Offer as Capable of Creating Legal Relations—Definiteness and Certainty.*

An offer or proposal must be capable of creating legal relations, or no contract can result, whatever may be the intention of the parties. An agreement cannot create an obligation, or legal relations, unless it is capable of being enforced by the courts; and, as we have seen in discussing the nature of contract, creation of an obligation is essential.

It follows from this that, to result in a contract, the agreement must be sufficiently definite and certain to enable the court to collect from it the full intention of the parties, for the court cannot make an agreement for them.<sup>117</sup> It can only enforce the agreement as they have made it. The parties may have come to a real agreement, but they must take the chances of not having made it intelligible.<sup>118</sup> In stating this rule it is generally said that the contract or the agreement or the promise must be certain, but it is the same thing to say that the offer must be certain, for any uncertainty in an agreement must necessarily arise from uncertainty in the offer. An uncertain offer is sometimes apparently remedied by its acceptance, but this is not really so. As we have seen, an acceptance, to be effective, must be identical with the terms of the offer. If it varies from them, as it must in order to remedy uncertainty in the offer, it is not an acceptance, but a counter offer, which, to result in a contract, must be accepted by the original proposer.

The rule, then, is that the offer must not be so indefinite as to

*Lawrence v. Milwaukee, L. S. & W. R. Co.*, 84 Wis. 427, 54 N. W. Rep. 797; *Rossiter v. Miller*, 5 Ch. Div. 648. See, also, ante, p. 38.

<sup>116</sup> *Leake, Cont.* 98; *Ridgway v. Wharton*, supra.

<sup>117</sup> *Thomson v. Gortner*, 73 Md. 474, 21 Atl. Rep. 371. Uncertainty as to price or terms of payment on sale of land. *George v. Conhalm*, 38 Minn. 338, 37 N. W. Rep. 791; *Smoyer v. Roth* (Pa. Sup.) 13 Atl. Rep. 191; *Everett v. Dilley*, 39 Kan. 73, 17 Pac. Rep. 661.

<sup>118</sup> *Pol. Cont.* 42.

make it impossible for the court to say what was promised.<sup>119</sup> Thus, where a person bought a horse, and promised that, if it was lucky to him, he would give a certain additional sum, "or the buying of another horse," it was held that the promise was too loose and vague to be considered in a court of law.<sup>120</sup> And so, where a person agrees to perform services for such remuneration as shall be deemed right, or for such wages as his employer shall deem right or reasonable, or for "good wages," it is held that there is not a sufficiently definite promise of payment to be capable of enforcement.<sup>121</sup>

*Same*—"Id Certum est Quod Certum Reddi Potest."

This rule, however, is subject to the maxim, "Id certum est quod certum reddi potest."<sup>122</sup> For this reason an offer to sell goods need not necessarily specify the amount that may be ordered, but may leave it for the person to whom the offer is made to specify the

<sup>119</sup> *Guthing v. Lynn*, 2 Barn. & Adol. 232; *Sherman v. Kitzmiller*, 17 Serg. & R. (Pa.) 45; *Freed v. Mills*, 120 Ind. 27, 22 N. E. Rep. 86; *Thomson v. Gortner*, 73 Md. 474, 21 Atl. Rep. 371; *Erwin v. Erwin*, 25 Ala. 236.

<sup>120</sup> *Guthing v. Lynn*, *supra*.

<sup>121</sup> *Taylor v. Brewer*, 1 Maule & S. 290; *Roberts v. Smith*, 4 Hurl. & N. 315; *Fairplay School Tp. v. O'Neill*, 127 Ind. 93, 26 N. E. Rep. 686. But see *Caldwell v. School Dist.*, 55 Fed. Rep. 372.

The following promises have been held void for uncertainty: A promise to give a person a house, and provide for her at the promisor's death, if she would live with him. *Wall's Appeal*, 111 Pa. St. 460, 5 Atl. Rep. 220. A promise to let a person retain possession of property on his paying the same rent the promisor "might be able to obtain from other parties." *Gelston v. Sigmund*, 27 Md. 334. An agreement that a person should have the preference in the renting of property so long as it should be rented for a store. *Delashmutt v. Thomas*, 45 Md. 140. An agreement to take a house "if put into thorough repair," and if the drawing rooms were "handsomely decorated, according to the present style." *Taylor v. Portington*, 7 De Gex, M. G. 328. An agreement to sell land, reserving "the necessary land for making a railway." *Pearce v. Watts*, 20 Eq. 492. Agreement by which a person is to work in a mine, and receive a certain sum per ton on all ore produced, as long as the mine can be made to pay. *Davie v. Lumberman's Min. Co.*, 93 Mich. 491, 53 N. W. Rep. 625. Promise to take note for certain sum, without specifying terms. *Van Schaick v. Van Buren*, 70 Hun, 575, 24 N. Y. Supp. 306.

<sup>122</sup> *Parker v. Pettit*, 43 N. J. Law, 512; *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. Rep. 500; *Thompson v. Stevens*, 71 Pa. St. 161.

amount in his acceptance. If this is the intention of the parties, the acceptance concludes the contract, and does not amount to a counter proposal necessary to be accepted.<sup>123</sup> The intention is important here, in order to distinguish these cases from those in which it is held that the acceptance does not conclude a contract because the proposer did not intend to affect his legal relations, but merely to invite negotiations.<sup>124</sup> For the same reason it is not necessary, in offering to sell goods, to name the price, for, if no price is specified, a reasonable price will be implied. Other illustrations of the application of this rule are given below.<sup>125</sup>

*Same—Capacity of Parties—Form—Consideration—Legality of Object.*

We shall presently treat in separate chapters and at some length of the capacity of parties to contract, of form, of consideration, and

<sup>123</sup> *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. Rep. 389.

<sup>124</sup> *Ante*, p. 60.

<sup>125</sup> The following contracts have been held sufficiently certain: Contract making extent of promisor's liability such as may be imposed by a certain statute. *Town of Hamden v. Merwin*, 54 Conn. 418, 8 Atl. Rep. 670. A promise to buy all the supplies of a certain kind the promisor may need. *Lenz v. Brown*, 41 Wis. 172; *Levey v. New York C. & H. R. R. Co.*, 4 Misc. Rep. 415, 24 N. Y. Supp. 124. See post, p. 171. A promise to sell all the future produce of a certain vineyard the promisee may wish. *Keller v. Ybarru*, 3 Cal. 147. And see *Bates v. Childers* (N. M.) 20 Pac. Rep. 164; *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 South. Rep. 247. Definiteness as to territory in which party shall have exclusive right to sell goods,—“in D. and the territory tributary thereto.” *Kaufman v. Farley Manuf'g Co.*, 78 Iowa, 679, 43 N. W. Rep. 612. Describing a party as “Mr. Lee” does not render the contract uncertain, as it may be explained by parol. *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. Rep. 835. Promise to erect “a good steam saw-mill.” *Fraley v. Bentley* (Dak.) 46 N. W. Rep. 506. Sale of a stock of merchandise, “all soiled or damaged goods at valuation.” *Sergeant v. Dwyer*, 44 Minn. 309, 46 N. W. Rep. 444. Promise to employ a person “for 12 months commencing not later than the 15th of July, possibly the 1st of July, the date to be fixed by” the promisee. *Troy Fertilizer Co. v. Logan* (Ala.) 12 South. Rep. 712. An agreement to furnish a person with “steady and permanent employment.” *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. Rep. 802. Agreement to furnish a certain number of car loads of lumber, a car load varying from 35,000 to 60,000 feet. *Indianapolis Cabinet Co. v. Herrmann* (Ind. App.) 34 N. E. Rep. 579. Sale of nine walnut trees standing on the vendor's land, marked when the sale is made. *Carpenter v. Medford*, 99 N. C. 495, 6 S. E. Rep. 785.

of the legality of the object of contracts, and it is unnecessary to do more than mention the questions here.

As an agreement cannot affect the legal relations of the parties unless it is such that the law can enforce it, an offer cannot result in a contract unless it is made by and to parties who are capable in law of making a contract.

Again, the law, as we shall see, requires a particular form for certain contracts. Some contracts are required to be under seal, others are required to be in writing, while some may be either in writing or by word of mouth, or both. Where the law declares a certain form essential, the requirement must be observed, in order to affect legal relations.

Again, as we shall see after a while, a promise not made under seal will not be enforced unless it is supported by a consideration. In order, therefore, that an offer not under seal may be turned into a binding promise by acceptance, a consideration is necessary. Simple assent to the offer is not enough; the acceptor must either do or forbear to do some act, or make a promise in return, and the act, forbearance, or promise must be of such a nature as to constitute what the law deems a consideration. So, also, if the offer is to be accepted by the giving of a promise, the act, forbearance, or promise offered must constitute a consideration for the promise to be given by the acceptor.

Again, the act, forbearance, or promise offered, and the act, forbearance, or promise asked in return, must be lawful. If the consideration or object of the agreement is unlawful,—as, for instance, where it is the commission of crime,—the courts cannot enforce it, and therefore no legal obligation is created.

## CHAPTER III

CLASSIFICATION OF CONTRACTS—CONTRACTS UNDER SEAL AND  
CONTRACTS OF RECORD.

- 31. Classification of Contracts.
- 32. Contracts of Record.
- 33. Contracts Under Seal—In General.
- 34-36. How Contracts Under Seal are Made.
- 37. Characteristics of Contract under Seal.
- 38-39. Necessity for Contract Under Seal.

In the last chapter we have dealt with the mode in which the common intention of the parties must be communicated, and shown how it must refer to legal relations, in order that it may form the basis of a contract, and we incidentally mentioned that, in order that an agreement may be capable of affecting legal relations, there must be either a consideration or else some form which dispenses with the necessity for consideration, and in some cases both form and consideration. We come now to treat more at length of this question of form and consideration. It is not enough that the common intention of the parties is communicated in the mode we have described, and that the parties intend legal consequences. Most systems of law, including our own, require certain marks to be present in agreements before they will recognize them as valid contracts, and, if these marks are absent, the intention of the parties and its communication will not avail to create an obligation between them. In our law there are two such marks,—form and consideration. Sometimes one, sometimes the other, and sometimes both are required to render a contract enforceable. By “form” is meant some peculiar solemnity attaching to the expression of agreement; by “consideration,” some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee, or some detriment suffered by the promisee.<sup>1</sup>

<sup>1</sup> Anson, Cont. 36. The student will do well to read in this connection what Anson says in regard to the history and development of the doctrines of form and consideration. See Anson, Cont. pp. 36-42.

## CLASSIFICATION OF CONTRACTS.

**31. Contracts are divided into—**

- (a) **Contracts dependent for their validity upon their form alone, or strictly formal contracts.**

**These are:**

- (1) **Contracts of record.**
- (2) **Contracts under seal.**

- (b) **Simple or parol contracts, which may be divided into—**

- (1) **Such as are dependent for their validity both on their form and on the presence of consideration. These are contracts not under seal, nor of record, but which are required by law to be in writing, either with or without a particular form.**
- (2) **Such as are dependent for their validity upon the presence of consideration alone, no form at all being required.**

Sir William Anson divides contracts into (a) formal contracts, or contracts dependent for their validity upon their form alone, under which he classes (1) contracts of record, and (2) contracts under seal; and (b) simple or parol contracts, or contracts which he declares to be dependent for their validity upon the presence of consideration, and under which he classes (1) contracts required by law to be in writing, and (2) contracts that may be made orally. This classification, however, has been justly objected to on the ground "that a contract which the law requires to be in writing, such as a promissory note or a guaranty, is as much dependent for its validity upon the form, and is as truly a formal contract, as one under seal. The latter requires only a writing and a seal, the former a writing and a consideration; but the writing in this instance is just as essential as is the consideration."<sup>2</sup>

<sup>2</sup> Brantly, Cont. 33.

There are two classes of contract which at common law depend for their validity upon their form alone. These are contracts under seal and contracts of record. They are strictly formal contracts. All other contracts are called "simple" or "parol" contracts, and depend for their validity upon the presence of consideration. Some of these contracts are also required, either by the custom of merchants, which is a part of the common law, or by statute, to be in writing, as in the case of bills of exchange and promissory notes, in the case of which a particular form is also required, and contracts within the statute of frauds; so that they depend for their validity upon their form as well as upon the presence of consideration. Simple contracts, not required by the common law or by statute to be in writing, may be made by word of mouth, or by conduct, as we have explained in treating of offer and acceptance. They need no particular form, but depend for their validity upon the presence of consideration alone.

We have, then, three classes of contracts: (a) Contracts of record; (b) contracts under seal; and (c) simple or parol contracts; or, if we classify according as a contract depends for its validity upon form or consideration, or both, we have: (a) Contracts dependent for their validity upon their form alone, or (1) contracts of record, and (2) contracts under seal; (b) simple or parol contracts, which are dependent for their validity both on their form and on the presence of consideration, or contracts required to be in writing, but not under seal nor of record; and (c) simple or parol contracts, for which no form at all is required, and which depend for their validity upon the presence of consideration alone.

All of these contracts, except contracts under seal and contracts of record, are called "simple" or "parol" contracts. The word "parol" strictly means "by word of mouth," and excludes writing; but the term is applied to all simple contracts, whether they are merely oral or required to be in writing. They all require consideration, the only distinction being in the fact that some must be in writing.<sup>a</sup> Whether or not a contract falls within one or the other of these classes depends on the requirements of the law, and not

<sup>a</sup> *Rann v. Hughes*, 7 Term R. 350; *Whitehill v. Wilson*, 3 Pen. & W. (Pa.) 405; *Perrine v. Cheeseman*, 11 N. J. Law, 174; *Stabler v. Cowman*, 7 Gill & J. (Md.) 284. See post, p. 153.



on the form used by the parties. The fact that a particular form is followed in making a contract for which no form is required, does not make it a formal contract. It remains a simple contract, and is governed by the law applicable to simple contracts.

We will now deal first with the contracts of record and contracts under seal, and then in following chapters with those forms which are superimposed upon simple contracts, and with consideration, the requisite common to all simple contracts, whether oral or written.

### CONTRACTS OF RECORD.

**32. The obligations which are styled "contracts of record" are:**

- (a) **Judgments of courts of record, whether entered by consent or rendered in invitum. In the latter case, however, the obligation is quasi contractual, and not contractual.**
- (b) **Recognizances, which are obligations, entered into before a court of record, to do or forbear from doing a certain thing under a penalty.**

#### *Judgments.*

A judgment of a court of record awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. The judgment is entered upon the record of the court, and for this reason is called a "formal" contract. This obligation may come into existence as the final result of litigation when the court pronounces judgment, or it may be created by agreement between the parties before litigation has commenced, or during its continuance. In the latter case there is agreement, and the agreement results in obligation. The judgment, therefore, has the features of contract. In the former, however, there is no consent on the part of the person bound, and the obligation, therefore, is not contractual, but quasi contractual.<sup>4</sup> Where the judgment is entered by agreement, the obligation results from a contract for the making of which certain formalities are required,—either a warrant of attorney, by which one party

<sup>4</sup> Post, p. 755.

gives authority to the other to enter judgment upon terms settled, or a *cognovit actionem*, by which the one party acknowledges the right of the other in respect of the pending dispute, and then gives a similar authority.<sup>6</sup>

*Characteristics of Judgment—Estoppel.*

The characteristics of an obligation of this nature are these:

(1) Its terms, so long as it has not been regularly vacated or reversed, admit of no dispute, but are conclusively proved by a production of the record. The judgment, however, to be so conclusive, must be valid. It must have been rendered by a court having jurisdiction of the subject-matter and of the parties, and must have been properly entered of record.<sup>6</sup>

*Same—Merger—Res Judicata.*

(2) As soon as it is created, the previously existing rights with which it deals merge or are extinguished in it. For instance, where a person sues another for breach of contract, or for a civil injury, and a judgment is entered, either by consent or after trial, neither party has any further rights in respect of the cause of action. The judgment conclusively settles their rights, and the matter is said to be *res judicata*.<sup>7</sup> Difficulties arise in applying the doctrine, but it would be beyond the scope of a book on contracts to go into the subject.

*Same—Remedies of Creditor.*

(3) The judgment creditor, or person in whose favor the judgment is entered, has certain advantages which an ordinary creditor does not possess. He has a double remedy for his debt. He can take out execution on the judgment, and so obtain directly the sum

<sup>6</sup> See Leake, *Cont.* 89-95.

<sup>7</sup> *Vooght v. Winch*, 2 Barn. & Ald. 662; *The Rio Grande v. Otis*, 23 Wall. 458; *Osage City Bank v. Jones*, 51 Kan. 379, 32 Pac. Rep. 1090; *Le Grange v. Ward*, 11 Ohio, 258; *Pennywit v. Foote*, 27 Ohio St. 600; *Burwell v. Burgwyn*, 105 N. C. 498, 10 S. E. Rep. 1099; *Suber v. Chandler*, 36 S. C. 344, 15 S. E. Rep. 426; *Junkans v. Bergin*, 64 Cal. 203, 30 Pac. Rep. 627; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. Rep. 74; *Hollister v. Abbott*, 31 N. H. 442; post, p. 705.

<sup>8</sup> *Smith v. Nichols*, 5 Bing. N. C., at page 220; *Harrington v. Harrington*, 154 Mass. 517, 23 N. E. Rep. 903; *Todd v. Stewart*, 9 Q. B. 759; *Oregonian Ry. Co. v. Oregon Ry.*, 27 Fed. Rep. 277; *Burton v. Shannon*, 99 Mass. 200; *Hill v. Morse*, 61 Me. 541; post, p. 705.

awarded, and he can also bring an action on the judgment for non-fulfillment of the obligation.

*Recognizance.*

A recognizance is an obligation of record entered into generally, but not necessarily, in a criminal case, before some court of record or magistrate duly authorized, with condition to do some particular act; as, for instance, to appear at court as a witness, or for trial, to keep the peace, or to pay a debt.<sup>a</sup>

### CONTRACTS UNDER SEAL.

33. Contracts under seal, otherwise called "deeds" or "specialties," derive their validity, at common law, from their form alone, and not from the fact of agreement, or consideration.

The contract under seal, at common law, derives its validity from its form alone, and not from the fact of agreement, nor from the consideration which may exist for the promise of either party. It is often said that the seal imports a consideration, but, as we shall see, this is incorrect in so far as the common law is concerned. At common law the question of consideration is altogether immaterial. The form alone gives the contract its validity.<sup>b</sup>

All contracts under seal are called "deeds" or "specialties." We generally use the term "deed" as applying to conveyances of land, but it applies as well to all contracts under seal. Particular contracts under seal, deeds, or specialties are: (1) Grants or conveyances of land, in which the parties are called respectively "grantor" and "grantee;" (2) bonds, which are obligations conditioned upon the payment of money, or the doing or forbearance from doing some act, the parties to a bond being called respectively "obligor" and "obligee;" and (3) covenants, which are agreements between two or more persons, entered into by deed,—that is, under seal,—whereby one or more of them promises the other or others the performance or nonperformance of certain acts, or that a given state of things

<sup>a</sup> Black, Law Dict. tit. "Recognizance;" 2 Bl. Comm. 341.

<sup>b</sup> Leake, Cont. 76.

does or shall or does not or shall not exist, the parties being called respectively "covenantor" and "covenantee."

#### HOW CONTRACTS UNDER SEAL ARE MADE.

34. A deed must be in writing or printed on paper or parchment, and must be sealed and delivered, and possibly signed.

35. Delivery is what renders a deed operative, and it takes effect from the date of its delivery.

36. ESCROW—A deed may be delivered subject to a condition, in which case it is termed an escrow. The rules governing a deed delivered in escrow are that:

- (a) The deed does not take effect until the condition is performed.
- (b) When the condition is performed, the deed takes effect from the date of the original delivery.
- (c) To constitute an escrow, the deed must be delivered to a third party. If delivered to the other party to it, or to his agent, it takes effect at once.

A deed must be in writing, or printed on paper or parchment.<sup>10</sup>

It is often said to be executed, or made conclusive as between the parties, by being "signed, sealed, and delivered." At common law there seems to be some doubt whether signature to a deed is necessary,<sup>11</sup> but it is at least safer to sign. That, however, which identifies a party to a deed with its execution is the presence of his seal; that which makes it operative, so far as he is concerned, is the fact of its delivery by him.<sup>12</sup>

"A deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. \* \* \* A deed cannot be written upon wood, leather, cloth, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted." Shep. Touch. 50; Co. Litt. 35b.

<sup>10</sup> Leake, Cont. 78; Cooch v. Goodman, 2 Q. B. 597; Cromwell v. Grunsden, 2 Salk. 462; Jeffery v. Underwood, 1 Pike (Ark.) 108.

<sup>11</sup> Anson, Cont. 46.

*The Seal.*

There cannot be a deed or specialty without a seal.<sup>12</sup>

A seal is said by Lord Coke to be wax, with an impression,<sup>14</sup> and no doubt anciently wax was the only substance used; but it is no longer essential. The impression may be made on a wafer attached to the instrument, or any other substance sufficiently tenacious to adhere, and capable of receiving an impression.<sup>15</sup> It is therefore held sufficient if the impression is made on the paper itself on which the instrument is written. It need not be on a separate substance attached to the instrument.<sup>16</sup>

Some of the states have passed statutes allowing a scroll or scrawl made with the pen to be used in the place of a seal,<sup>17</sup> and some courts have held, independent of statute, that a scroll is sufficient.<sup>18</sup> At common law, however, this is not permissible; there must be an impression.<sup>19</sup>

<sup>12</sup> *State v. Thompson*, 49 Mo. 188; *Vance v. Funk*, 2 Scam. (Ill.) 263; *Chilton v. People*, 66 Ill. 501; *Stabler v. Cowman*, 7 Gill & J. (Md.) 284; *Boothbay v. Gilles*, 68 Me. 160; *Corbin v. Laswell*, 48 Mo. App. 626. Where, however, a seal is omitted by mistake, a court of equity will reform the instrument by supplying one, or will restrain the setting up of the want of one to defeat a recovery at law. *Bernards Tp. v. Stebbins*, 109 U. S. 341, 3 Sup. Ct. Rep. 252; *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Town of Rutland v. Page*, 24 Vt. 181; *Montville v. Haughton*, 7 Conn. 543; *Sullivan v. Latimer*, 38 S. C. 417, 17 S. E. Rep. 221. The matter appearing on an instrument must have been intended as a seal. The fact that it appears to be a seal, if it was not so intended, does not make the instrument a specialty. *Clement v. Gunhouse*, 5 Esp. 83; *Blackwell v. Hamilton*, 47 Ala. 470. As to presumption that there was a seal on an ancient deed on which no seal appears, see *Rensens v. Staples*, 52 Fed. Rep. 91.

<sup>13</sup> 3 Coke, Inst. 169.

<sup>14</sup> 4 Kent, Comm. 452; *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; *Beardsley v. Knight*, 4 Vt. 471.

<sup>15</sup> *Pillow v. Roberts*, 13 How. 472; *Pierce v. Indseth*, 106 U. S. 540, 1 Sup. Ct. Rep. 418; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381.

<sup>16</sup> Such is the case in California, Connecticut, Florida, Indiana, Illinois, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Virginia, West Virginia, and Wisconsin, and probably in other states.

<sup>17</sup> *Hacker's Appeal*, 121 Pa. St. 192, 15 Atl. Rep. 500; *Lee v. Adkins*, 1 Min. (Ala.) 187; *Bertrand v. Byrd*, 4 Ark. 195; *Hastings v. Vaughan*, 5 Cal. 315; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *Underwood v. Dollins*, 47 Mo. 259; *Groner v. Smith*, 49 Mo. 318.

<sup>18</sup> *Warren v. Lynch*, *supra*; *Hendee v. Pinkerton*, *supra*; *Bates v. Boston*

At common law the mere affixing of the seal makes the instrument a contract under seal, but it has been held that, where a scroll is used, there must be some recital in the body of the instrument recognizing it as a seal.<sup>20</sup> The authorities on this point are not in accord.<sup>21</sup>

One seal may do for any number of parties signing a deed if each one adopts it as his own, but it is always safer to have a seal for each signature.<sup>22</sup>

#### *Delivery.*

To render an instrument under seal a valid and binding contract, it must be delivered. This is essential.<sup>23</sup> Delivery may be effected either by actually handing the instrument to the other party him-

& N. Y. C. R. Co., 10 Allen (Mass.) 251; *Perrine v. Cheeseman*, 11 N. J. Law, 174. In *Bates v. Boston & N. Y. C. R. Co.*, 10 Allen (Mass.) 251, it was held that a fac simile of the seal of a corporation, printed upon blank forms of obligations, prepared to be executed by the corporation, at the same time when the blank is printed, and by the same agency, is not a seal at common law; and that such forms, when executed by the corporation, will not be contracts under seal, though the language of them calls for a seal.

\* *Cromwell v. Tate*, 7 Leigh (Va.) 301; *Lee v. Adkins*, 1 Min. (Ala.) 187; *Glasscock v. Glasscock*, 8 Mo. 577; *Lewis v. Overby*, 23 Grat. (Va.) 627.

\* "The authorities," says Prof. Knowlton in his edition of *Anson on Contracts*, "are not in accord upon this question; and, while much may depend on the wording of the statute allowing the scroll, still it is believed that, if the device adopted is intended to be a seal, it is to be regarded as such, though the intention be not expressly declared. The presumption is that the parties undertook to execute such an instrument as would be effectual for the purpose intended." Knowlton's *Anson*, Cont. 55. See *Burton v. Leroy*, 5 Sawy. 510, Fed. Cas. No. 2,217; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *Eames v. Preston*, 20 Ill. 389; *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. Rep. 650; *Wing v. Chase*, 35 Me. 260; *Richardson v. Scott River Co.*, 22 Cal., at page 137; *Frevall v. Fitch*, 5 Whart. (Pa.) 325; 21 Am. & Eng. Enc. Law, 894, note.

\* *Ball v. Dunsterville*, 4 Term R. 313; *Ludlow v. Simond*, 2 Caines, Cas. 1; *Pickens v. Rymer*, 90 N. C. 282; *Davis v. Burton*, 3 Scam. (Ill.) 41; *Yale v. Flanders*, 4 Wis. 96; *Burnett v. McCluey*, 78 Mo., at page 688; *Hollis v. Pond*, 7 Humph. (Tenn.) 221; *In re Hess' Estate* (Pa. Sup.) 24 Atl. Rep. 676; *Norville v. Walker*, 9 W. Va. 447; *Citizens' Building Ass'n v. Cummings* (Ohio Sup.) 16 N. E. Rep. 841.

\* *Shep. Touch.* 57; *Cook v. Brown*, 34 N. H. 476; *Johnson v. Farley*, 45 N. H. 506; *Overman v. Kerr*, 17 Iowa, 490; *Fisher v. Hall*, 41 N. Y. 421; *Duer v. James*, 42 Md. 492; *Younge v. Gullbeau*, 3 Wall. 641; *Harris v.*

self,<sup>24</sup> or to a stranger for his benefit,<sup>25</sup> or by words indicating an intention that the instrument shall become binding though it is retained in the possession of the party executing it.<sup>26</sup> In all cases there must be an intention to deliver the instrument. Merely to part with the possession of it, without intending thereby to render it operative, is not a delivery.<sup>27</sup>

Regester, 70 Md. 109, 16 Atl. Rep. 386. Obtaining deed by fraud, no delivery. *Fisher v. Beckwith*, 30 Wis. 55; *Gould v. Wise*, 97 Cal. 532, 32 Pac. Rep. 576, and 33 Pac. Rep. 323.

<sup>24</sup> *Richmond v. Morford*, 4 Wash. 337, 30 Pac. Rep. 241, and 31 Pac. Rep. 513; *Bogle v. Bogle*, 35 Wis. 639.

<sup>25</sup> *Peavey v. Tilton*, 18 N. H. 151; *Mitchell v. Ryan*, 3 Ohio St. 377; *Otis v. Spencer*, 102 Ill. 622; *Douglas v. West*, 140 Ill. 455, 31 N. E. Rep. 403; *Hall v. Hall*, 107 Mo. 101, 17 S. W. Rep. 811; *Williams v. Latham*, 113 Mo. 165, 20 S. W. Rep. 99; *Brown v. Brown*, 66 Me. 316; *Duer v. James*, 42 Md. 492; *Haenni v. Blesch*, 146 Ill. 262, 34 N. E. Rep. 153; *Colyer v. Hyden* (Ky.) 21 S. W. Rep. 888; *White v. Pollock* (Mo. Sup.) 22 S. W. Rep. 1077.

<sup>26</sup> *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Benneson v. Aiken*, 102 Ill. 284; *McCullough v. Day*, 45 Mich. 554, 8 N. W. Rep. 535; *Dunham v. Pitkin*, 53 Mich. 504, 19 N. W. Rep. 166; *Wall v. Wall*, 30 Miss. 91. Recording of deed by grantor may be presumptive evidence of delivery. *Glaze v. Three Rivers, etc., Ins. Co.*, 87 Mich. 349, 49 N. W. Rep. 595; *Steele v. Lowry*, 4 Ohio, 72; *Kemp v. Walker*, 16 Ohio, 118; *Tobin v. Bass*, 85 Mo. 654; *Burke v. Adams*, 80 Mo. 504; *Swiney v. Swiney*, 14 Lea (Tenn.) 316; *Vaughan v. Godman*, 103 Ind. 499, 3 N. E. Rep. 257; *Walton v. Burton*, 107 Ill. 54; *Moore v. Giles*, 49 Conn. 570; *Palmer v. Palmer*, 62 Iowa, 204, 17 N. W. Rep. 463. The presumption may be rebutted, however, by showing that there was in fact no delivery and acceptance. *Hendricks v. Rasson*, 53 Mich. 575, 19 N. W. Rep. 192; *Jefferson Co. Bldg. Ass'n v. Heil*, 81 Ky. 516; *Weber v. Christen*, 121 Ill. 91, 11 N. E. Rep. 893. In New York it is held that the mere fact of recording raises no presumption of delivery. *Gifford v. Corrigan*, 105 N. Y. 223, 11 N. E. Rep. 498. In Maine it is said that recording is not evidence of delivery. *Hill v. McNichol*, 80 Me. 209, 13 Atl. Rep. 888.

<sup>27</sup> *Jordan v. Davis*, 108 Ill. 336; *Adams v. Ryan*, 61 Iowa, 733, 17 N. W. Rep. 159; *Ireland v. Geraghty*, 15 Fed. Rep. 45. "A delivery may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor, and the person to whom it is delivered, that the deed shall presently become operative and effectual; that the grantor loses all control over it; and that by it the grantee is to become possessed of the estate,—constitutes a sufficient delivery. The very essence of the delivery is the intention of the party." *Marshall D. Ewell*, in note to *Ireland v. Geraghty*, *supra*. And see *Bryan v. Wash*, 2 Gilm. (Ill.) 565; *Walker v. Walker*, 42 Ill. 311; *Masterton v. Cheek*, 23 Ill. 72; *Duer v. James*, 42 Md.

To constitute a good delivery, there must also be an acceptance by the other party,<sup>28</sup> but the acceptance need not always be expressly shown. Where the instrument is clearly beneficial to the other party, its acceptance will be presumed,<sup>29</sup> though, of course, this cannot be so, even when it is beneficial, if acceptance is in fact refused, for a man cannot be compelled to accept even a benefit.<sup>30</sup>

Possession by the grantee or obligee is *prima facie* evidence of delivery and acceptance.<sup>31</sup>

As the delivery of a contract under seal is what makes it operative, its date is the date of delivery. The date appearing on the instrument is entirely immaterial. It may have no date at all, or an impossible date.<sup>32</sup> In the absence of anything to show the contrary, a deed will be presumed to have been delivered on the day of

492; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Nichol v. Davidson Co.*, 3 Tenn. Ch. 547; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Gregory v. Walker*, 38 Ala. 26; *Dearmond v. Dearmond*, 10 Ind. 191; *Summers v. Pumphrey*, 24 Ind. 231; *Burkholder v. Casad*, 47 Ind. 418; *Rogers v. Cary*, 47 Mo. 235; *Williams v. Schatz*, 42 Ohio St. 47; *Goodlet v. Kelly*, 74 Ala. 213; *Davis v. Williams*, 57 Miss. 843; *Burnett v. Burnett*, 40 Mich. 361. Where a deed is placed in the hands of a depositary to be delivered to the grantee upon the death of the grantor, or at any other time, but the grantor reserves the right and power to recall it at any time, there is no delivery. *Cook v. Brown*, *supra*; *Stinson v. Anderson*, 96 Ill. 373; *Prestman v. Baker*, 30 Wis. 644; *Baker v. Haskell*, 47 N. H. 479; *Brown v. Brown*, 66 Me. 316; *Duer v. James*, 42 Md. 482.

<sup>28</sup> *Moore v. Flynn*, 135 Ill. 74, 25 N. E. Rep. 844; *Mitchell v. Ryan*, 3 Ohio St. 377; *Cabett v. Norcross*, 35 N. H. 99; *Leppoe v. National Union Bank*, 32 Md. 136; *Comer v. Baldwin*, 16 Minn. 172 (Gil. 151). Since acceptance is necessary to delivery, and the deed takes effect only from delivery, third parties may acquire rights by attachment or otherwise at any time before acceptance. *Bell v. Farmer's Bank*, 11 Bush (Ky.) 84; *Parmelee v. Simpson*, 5 Wall. 51; *Day v. Griffith*, 15 Iowa, 104.

<sup>29</sup> *Peavey v. Tilton*, 18 N. H. 151; *Boody v. Davis*, 20 N. H. 140; *Mitchell v. Ryan*, 3 Ohio St. 377; *Halluck v. Bush*, 2 Root (Conn.) 26; *Wall v. Wall*, 80 Miss. 91.

<sup>30</sup> See *Leake*, Cont. 81; *Butler and Baker's Case*, 3 Coke, 26b; *St. Louis, I. M. & S. R. Co. v. Ruddell*, 53 Ark. 32, 13 S. W. Rep. 418.

<sup>31</sup> *Keedy v. Moats*, 72 Md. 325, 19 Atl. Rep. 965; *Dawson v. Hall*, 2 Mich. 300; *Wood v. Chetwood* (N. J. Ch.) 14 Atl. Rep. 21.

<sup>32</sup> *McMichael v. Carlyle*, 53 Wis. 504, 10 N. W. Rep. 556.



its date, but delivery at a different time may always be shown by extrinsic evidence.<sup>33</sup>

*Same—Escrow.*

A deed may be delivered to a stranger, to be by him delivered to the other party to it on the fulfillment of certain conditions, in which case it does not take effect until the condition is fulfilled.<sup>34</sup> This is a delivery in escrow, and during this period the deed is termed an "escrow." Immediately upon fulfillment of the conditions, the deed becomes operative, without actual delivery by the depository.<sup>35</sup> To constitute an escrow, the delivery by the depository must be conditional. If it is merely postponed, the delivery to him is an effective delivery to the grantee or obligee, and not a delivery in escrow.<sup>36</sup> A deed thus conditionally delivered must be delivered to a stranger. If it is delivered to the other party, or to his agent, it will take effect at once, in spite of the conditions, on the ground that a delivery in fact outweighs verbal conditions.<sup>37</sup>

There is no delivery, even as an escrow, where the grantor or obligor retains control of the deed with power to withdraw it.<sup>38</sup>

<sup>33</sup> *Faulkner v. Adams*, 128 Ind. 459, 26 N. E. Rep. 170; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. Rep. 319; *Smith v. Porter*, 10 Gray (Mass.) 66; *Battles v. Fobes*, 21 Pick. (Mass.) 239.

<sup>34</sup> *Harkreader v. Clayton*, 56 Miss. 383; *Wheelwright v. Wheelwright*, 2 Mass. 447; *Prutsman v. Baker*, 30 Wis. 644.

<sup>35</sup> *Prutsman v. Baker*, *supra*; *Couch v. Meeker*, 2 Conn. 302; *White Star Line Steamboat Co. v. Moragne*, 91 Ala. 610, 8 South. Rep. 867.

<sup>36</sup> *Martin v. Flaharty* (Mont.) 32 Pac. Rep. 287.

<sup>37</sup> *Co. Litt.* 36a; *Dawson v. Hall*, 2 Mich. 390; *Fairbanks v. Metcalf*, 8 Mass. 230; *Foley v. Cowgill*, 5 Blackf. (Ind.) 18; *McCan v. Atherton*, 108 Ill. 31; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. Rep. 379; *Miller v. Fletcher*, 27 Grat. (Va.) 403; *Wendlinger v. Smith*, 75 Va. 309; *Badcock v. Steadman*, 1 Root (Conn.) 87; *Worrall v. Munn*, 5 N. Y. 229; *Braman v. Bingham*, 26 N. Y. 433; *Cocks v. Barker*, 49 N. Y. 110; *Graves v. Tucker*, 10 Smedes & M. (Miss.) 9; *State v. Thatcher*, 41 N. J. Law, 403; *Gibson v. Partee*, 2 Dev. & B. (N. C.) 530; *Williams v. Higgins*, 69 Ala. 517; *Duncan v. Pope*, 47 Ga. 445; *Wellborn v. Weaver*, 17 Ga. 267; *Hagood v. Harley*, 8 Rich. Law (S. C.) 325; *Richmond v. Morford*, 4 Wash. 337, 30 Pac. Rep. 241, and 31 Pac. Rep. 513; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. Rep. 799; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. Rep. 1016.

<sup>38</sup> *Prutsman v. Baker*, *supra*; *Campbell v. Thomas*, 42 Wis. 437; *Brown v. Brown*, 60 Me. 316.

Upon delivery of an escrow, and performance or happening of the condition, the deed becomes effective from the date of the original delivery; so that, if a bond is delivered as an escrow, and before fulfillment of the condition the obligor and obligee die, yet, on fulfillment of the condition, it becomes an effective bond, and charges the assets of the deceased obligor.\*\*

*Execution in Blank.*

A deed executed in blank—that is, completely sealed and delivered, with an omission of a material particular—is void, and cannot be made good by subsequently filling in the blank without a re-execution, or what is equivalent thereto.\*\*

*Deed Poll and Indenture.*

Formerly there was a distinction between a deed poll and an indenture. A deed poll was a deed made by one party, and having a polled or smooth-cut edge. Where a deed was made by two or more parties, and contained mutual covenants, it was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called indentures. The distinction, even where it has not been abolished by statute, is no longer of any practical importance; but the terms are still used,—the term “deed poll” to signify a deed made by one party only, and the term “indenture,” a deed made between two or more parties, all of whom execute it.

\* Leake, Cont. 79.

\* Leake, Cont. 79; Powell v. Duff, 3 Camp. 181; Weeks v. Maillardet, 14 East, 568. Blank for sum of money afterwards filled in. Hudson v. Revett, 5 Bing. 368.

**CHARACTERISTICS OF CONTRACT UNDER SEAL.**

**37. The chief characteristics of a deed or contract under seal are that :**

- (a) The recitals are conclusive against the parties. They are said to be estopped thereby.
- (b) It merges a prior simple contract.
- (c) A right of action is not barred until the lapse of a longer time than in case of simple contracts.
- (d) No consideration is necessary.

**EXCEPTIONS—**(1) Contracts in partial restraint of trade.

(2) Where there was a consideration, it may be shown to have been illegal or immoral.

(3) Courts of equity will not specifically enforce a deed without consideration.

(4) In equity, absence of consideration is corroborative evidence of fraud or undue influence.

(5) By statute in some states the distinction between sealed and unsealed instruments is abolished, while in others a seal is merely declared presumptive, but rebuttable, evidence of a consideration.

*Estoppel by Deed.*

Statements made in a simple contract, though strong evidence against the parties thereto, are not absolutely conclusive against them, but may be contradicted. Statements made in a deed, however, are absolutely conclusive against the parties to the deed or their privies in any legal proceedings between them taken upon the deed.<sup>41</sup> The principle is that, where a man has entered into a

<sup>41</sup> *Carver v. Jackson*, 4 Pet. 1, at page 83; *Redman v. Bellamy*, 4 Cal. 247; *Jackson v. Parkhurst*, 9 Wend. (N. Y.) 209; *Smith v. Burnham*, 9 Johns. (N. Y.) 306; *Douglass v. Scott*, 5 Ohio, at page 198; *Cutler v. Dickinson*, 8 Pick. (Mass.) 386; *Dobbin v. Cruger*, 108 Ill. 188; *City of Ottawa v. First Nat Bank*, 105 U. S. 342; *Stowe v. Wyse*, 7 Conn. 214; *Gerry v. Stimson*, 60 Ma.

solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted. Such a prohibition to deny facts is termed an "estoppel by deed." The statements, however, must not be of immaterial matters, or matters by way of general recital, and the deed must be valid.<sup>42</sup> It is settled also that an acknowledgment in a deed of the receipt of consideration is not conclusive, but may be contradicted.<sup>43</sup> Recitals in a deed are, of course, only conclusive against the parties thereto and their privies, or those claiming under or through them. They do not work an estoppel as between strangers, nor as between a stranger and a party to the deed.<sup>44</sup>

### *Merger.*

Where, after making a simple contract, the parties enter into an identical and coextensive engagement under seal, the simple contract is merged in the deed, and becomes extinct; for one cannot have, in respect of the same demand, a coexisting remedy, by proceeding both on covenant and on simple contract.<sup>45</sup> This extinction is called "merger." The contracts, however, must be the same,—

186; *Green v. Clark*, 13 Vt. 158; *Van Rensselaer v. Kearney*, 11 How., at page 322; *Howard v. Massengale*, 13 Lea (Tenn.) 577; *Thompson v. Smith* (Mich.) 55 N. W. Rep. 886; *Carson v. Cochran*, (Minn.) 53 N. W. Rep. 1130; *Moore v. Earl*, 91 Cal. 632, 27 Pac. Rep. 1087; *Chapman v. Persinger*, 87 Va. 581, 13 S. E. Rep. 549; *Billingsley v. Harris*, 79 Wis. 103, 48 N. W. Rep. 108; *Metropolitan Ins. Co. v. McCoy*, 124 N. Y. 47, 26 N. E. Rep. 345; *Rogers v. Bollinger*, (Ark.) 26 S. W. Rep. 12; *Balue v. Taylor*, (Ind. Sup.) 36 N. E. Rep. 269; *Johnston v. Oliver* (Ohio) Id. 458; *Willis v. Terry*, (Ky.) 24 S. W. Rep. 621.

\* *Wallace v. Miner*, 6 Ohio, 367; *Zimmer v. San Luis Water Co.*, 57 Cal. 221.

\* *Wilkinson v. Scott*, 17 Mass. 249; *Irvine v. McKeon*, 23 Cal. 472; *Witbeck v. Walne*, 16 N. Y. 532; *White v. Miller*, 22 Vt. 380; *Thayer v. Viles*, 23 Vt. 494; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460; *Pritchard v. Brown*, 4 N. H. 397; *Smith v. Arthur*, 110 N. C. 400, 15 S. E. Rep. 197; *Union Ins. Co. v. Kirchoff* (Ill. Sup.) 27 N. E. Rep. 91.

\* *Thomason v. City of Dayton*, 40 Ohio St. 63; *Allen v. Allen*, 45 Pa. St., at page 473; *Brittain v. Daniels*, 94 N. C. 781; *Reeves v. Brayton*, 36 S. C. 384, 15 S. E. Rep. 653.

\* *Price v. Moulton*, 10 C. B. 561; *Banorgree v. Hovey*, 5 Mass. 11; *Leonard v. Hughlett*, 41 Md. 380; *Cursom v. Monteiro*, 2 Johns. (N. Y.) 308; *Coleman v. Hart*, 25 Ind. 256; *Rhoads v. Jones*, 92 Ind. 328; *Robbins v. Ayres*, 10 Mo. 538; *McNaughton v. Partridge*, 11 Ohio, 223; *Burnes v. Allen*, 9 Ired. (N. C.) 370; *Berry v. Bacon*, 28 Miss. 318; *Griswold v. Eastman*, 51 Minn.

that is, the subject-matter must be identical,—and they must be between the same parties.<sup>46</sup>

If the contract under seal is expressly received as collateral security for performance of the simple contract, or if it merely recognizes the debt, and fixes the mode of ascertaining its amount, there is no merger.<sup>47</sup>

#### *Limitation of Actions.*

A right of action arising out of a simple contract is barred by the lapse of a much shorter period of time than a right of action arising out of a contract under seal. The respective periods will vary somewhat under the statutes of the different states, but generally an action on a simple contract is barred in six years or less, while an action on a sealed instrument is not barred if brought within ten, or, in some jurisdictions, twenty, years.

#### *Gratuitous Promises.*

At common law, a gratuitous promise, or promise for which the promisor obtains no consideration, is binding if made under seal,<sup>48</sup> but is absolutely void in the absence of a seal. This characteristic of contracts under seal is often accounted for on the ground that their solemnity imports a consideration, but the supposition is historically untrue. At common law, even if it were allowable to show that there is no consideration for a deed, and if the obligee or grantee were to admit that there was no consideration, it could not affect the validity of the deed. It derives its validity solely from

189, 53 N. W. Rep. 542; *Clark v. Lindeke*, 44 Minn. 112, 46 N. W. Rep. 326; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. Rep. 239. But see *Shelby v. Chicago & E. I. R. Co.*, 143 Ill. 385, 32 N. E. Rep. 438; *Saville v. Chalmers*, 76 Iowa, 325, 41 N. W. Rep. 30; post, p. 685.

<sup>46</sup> *Witbeck v. Waine*, 16 N. Y. 532; *Hutchins v. Hebbard*, 34 N. Y. 24; *Day v. Leal*, 14 Johns. (N. Y.) 404; *Doty v. Martin*, 32 Mich. 462; post, p. 685.

<sup>47</sup> *Marryat v. Marryat*, 28 Beav. 224; *Van Vleet v. Jones*, 20 N. J. Law. 340; *Rees v. Logsdon*, 68 Md. 93, 11 Atl. Rep. 708; *Brengle v. Bushey*, 40 Md., at page 147; *Charles v. Scott*, 1 Serg. & R. (Pa.) 294; post, p. 685.

<sup>48</sup> 2 Bl. Comm. 446; *Cooch v. Goodman*, 2 Q. B. 580; *McMillan v. Ames*, 83 Minn. 257, 22 N. W. Rep. 612; *Dorr v. Munsell*, 13 Johns. (N. Y.) 430; *Van Valkenburgh v. Smith*, 60 Me. 97; *Harris v. Harris*, 23 Grat. (Va.) 737; *Wing v. Peck*, 54 Vt. 245; *Page v. Trufant*, 2 Mass. 159; *State v. Gott*, 44 Md. 341; *Edelin v. Sanders*, 8 Md. 118; *Fallowes v. Taylor*, 7 Term R. 475; *Day v. Davis*, 64 Miss. 253, 8 South. Rep. 203.

its form. The doctrine of consideration is of a much later date than that at which a contract under seal was in full efficacy, an efficacy which it owed entirely to its form.\*

*Same—Exceptions at Common Law.*

The general rule that a gratuitous promise under seal is binding without a consideration, and that want of consideration cannot be shown to defeat it, is subject to exceptions.

Even at common law a contract in partial restraint of trade, though made under the formality of a seal, must be supported by a consideration.<sup>49</sup> If, however, there is in fact a legal consideration, the courts will not inquire into its adequacy.<sup>50</sup>

Another exception at common law is in cases where there is in fact a consideration, but it is illegal or immoral. If there is no consideration for a deed, it is binding; but, if there is a consideration, it is open to the party sued on the contract to show that the consideration was illegal or immoral, in which case the deed is void.<sup>51</sup>

*Same—Exceptions in Equity.*

The idea of consideration as a necessary element of contract has always met with peculiar favor in courts of chancery. Equity will not grant its peculiar remedy of specific performance, nor exercise its peculiar power to correct mistakes and reform contracts, where the promises are without consideration, even though they are under seal.<sup>52</sup> So, also, in the exercise of its peculiar power of declaring a contract void and setting it aside on the ground of fraud and undue influence, it will look into the question of consideration, and absence

\*Anson, Cont. 49.

<sup>49</sup> *Mallan v. May*, 11 Mees. & W. 605; *Palmer v. Stebbins*, 3 Pick. (Mass.) 188; *Wiley v. Baumgardner*, 97 Ind. 68; *Keeler v. Taylor*, 53 Pa. St. 467. Of course this does not apply to contracts that are to such an extent in restraint of trade as to be contrary to public policy. Such contracts are void, as being illegal, without regard to the question of consideration. *Alger v. Thacher*, 19 Pick. (Mass.) 51. See post, p. 446.

<sup>50</sup> Post, p. 162.

<sup>51</sup> *Collins v. Blantern*, 1 Smith, Lead. Cas. 369; *Logan v. Plummer*, 70 N. C. 388. And see *Paxton v. Popham*, 9 East, 421.

<sup>52</sup> *Smith v. Wood*, 12 Wis. 425. *Bayler v. Com.*, 40 Pa. St. 37; *Black v. Cord*, 2 Har. & G. (Md.) 100; *Keffer v. Grayson*, 76 Va. 517; *Snyder v. Jones*, 88 Md. 542; *Anon.*, 12 Mod. 603.

of consideration will be regarded as corroborative evidence of fraud and undue influence."<sup>53</sup>

Even a court of equity, however, will not relieve a person from his obligation under a sealed contract, simply for want or failure of consideration."<sup>54</sup>

*Same—Statutory Changes in the Law.*

In some of the states the common-law rules in relation to sealed instruments have been either altogether abolished or greatly modified by statute. In some states it is declared that any written instrument, whether under seal or not, is presumptive evidence of a consideration, and all distinctions between sealed and unsealed instruments are expressly abolished, and in these states want or failure of consideration may always be shown, even though the instrument is sealed."<sup>55</sup>

In other states the distinction between sealed and unsealed instruments is not altogether abolished; but it is declared that the seal shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument were not sealed. The New Jersey court, in an action on a sealed note presented by a father to his daughter as a gift, held that such a statute as this did not abolish all distinctions between simple contracts and specialties, but merely established new rules of evidence, for the purpose of allowing parties to an instrument under seal to show that there was no consideration, where they intended that there should be a consideration; and that it did not make it impossible for parties to intentionally enter into binding gratuitous promises."<sup>56</sup>

<sup>53</sup> Hazard v. Erwin, 18 Pick. (Mass.) 95; Goudy v. Gebhart, 1 Ohio St. 202; Mortland v. Mortland, 151 Pa. St. 503, 25 Atl. Rep. 503.

<sup>54</sup> Doughty v. Miller, 50 N. J. Eq. 529, 25 Atl. Rep. 153.

<sup>55</sup> There are such statutes as this in California, Kentucky, Indiana, Iowa, Kansas, and probably in other states.

<sup>56</sup> Aller v. Aller, 40 N. J. Law, 448. And see Candor's Appeal, 27 Pa. St. 119; McMillan v. Ames, 33 Minn. 260, 22 N. W. Rep. 612.

**NECESSITY FOR CONTRACT UNDER SEAL.**

**38. A contract under seal is necessary at common law—**

- (a) Where the promise is without consideration.
- (b) Formerly, corporations could only contract under seal, with some few exceptions; but with us they can make contracts which they have the power to enter into in the same manner as a natural person, unless restricted by their charter.
- (c) Conveyances of land are in most jurisdictions required to be under seal.

**39. In most jurisdictions a seal is made necessary by statute in the case of particular contracts.**

**40. In many jurisdictions the necessity for use of a seal has been abolished.**

It is usually a matter of choice with persons whether they will contract by word of mouth or simply in writing, or in writing under seal; but in some cases, either at common law or by statute, it is necessary to employ the form of a deed. When a deed is required by law, an oral contract, or a written contract not under seal, will not do.

*At Common Law—Gratuitous Promises.*

There are two cases in which the old common law required that a contract should be made under seal, namely: (1) Where the contract was not founded on a consideration,—and this law is still in force except where it has been changed by statute; and (2) where it was made by a corporation,—but this rule is no longer recognized.

A gratuitous promise, or contract for which there is no consideration, must be made by deed; otherwise it will be void. This has already been shown to furnish a distinguishing characteristic between contracts under seal and simple contracts, and we have also stated the exceptions to the rule allowing a gratuitous promise if made under seal, and mentioned the changes made by statute in the different states. It is therefore unnecessary to say more on the subject.



*Same—Contracts with Corporations.*

Under the old common law the rule was that, with a few exceptions, a corporation could only contract under the corporate seal, but this rule has long ago been exploded, and now a corporation, unless restricted by its charter or by statute, may contract in the same manner as a natural person. This will be more fully explained in another connection.<sup>57</sup>

*Conveyances of Land.*

Probably, at common law, a conveyance of land was not required to be under seal, but in most jurisdictions this is necessary. It is not necessary to go into the question, as it belongs more properly to the subject of real property.

<sup>57</sup> Post, p. 282.

## CHAPTER IV.

### CONTRACTS REQUIRED TO BE IN WRITING—STATUTE OF FRAUDS.

- 40, 41. In General of Requirement of Writing.
- 42. Statute of Frauds—Contracts within Section 4—In General.
- 43. Promise by Executor or Administrator.
- 44. Promise to Answer for Debt, Default, or Miscarriage of Another.
- 45. Agreements in Consideration of Marriage.
- 46, 47. Agreements Relating to Land.
- 48. Agreements not to be Performed within a Year.
- 49, 50. Form Required by Section 4.
- 51-53. Effect of Noncompliance with Section 4.
- 54-57. Contracts within Section 17.
- 58, 59. Form Required by Section 17.
- 60-62. Effect of Noncompliance with Section 17.

### IN GENERAL OF REQUIREMENT OF WRITING.

40. At common law, or from necessity, bills of exchange and promissory notes must be in writing.

41. By statute, writing is in some, but not all, states declared necessary for the following contracts:

- (a) Acceptance of a bill of exchange or other order for the payment of money.
- (b) By act of congress, for assignments of copyrights and patents for inventions.
- (c) Acknowledgment of a debt barred by the statute of limitations.
- (d) Authority to bind another as surety.
- (e) New promise by infant, after attaining his majority.
- (f) By statute, in most, if not all, states conveyances of land are required to be in writing, and in a prescribed form.
- (g) By the statute of frauds in all states writing is necessary in certain specified contracts.

In the preceding chapter we have dealt with those contracts which acquire validity by reason of their form alone, and we now pass to simple or parol contracts, which depend for their validity upon the presence of consideration. As we have seen, however, there are some simple contracts which, while not in the solemn form of a deed or record, are required by law to be in writing, and which, therefore, depend not only on the presence of consideration, as in the case of other simple or parol contracts, but also on their form. These contracts, in so far as their form is concerned, we will deal with in the present chapter, and then in a following chapter we will deal with the doctrine of consideration,—the requisite common to all simple contracts.

Independently of any requirement of law as to form, an agreement which might be made orally may require writing, because of the intention of the parties not to be bound until their agreement is reduced to writing. Form, in these cases, is not necessary because of any requirement of law, but because of the intention of the parties. They have reached an agreement, but they do not contemplate or intend legal consequences until the agreement is reduced to writing. It is entirely a question of intention, and we have therefore considered the question in treating of offer and acceptance.<sup>1</sup> It is not necessary to do more than mention it here.

*Common Law and Necessity.*

The only requirement of form for simple contracts which can be said to exist independently of statute is in the case of negotiable bills of exchange and promissory notes. A bill of exchange is a kind of contract which originated in the custom of merchants, and which is designed to take the place of money, to some extent, as a circulating medium; and from its very nature and use as a negotiable instrument it must be in writing. The same may be said of promissory notes, which by statute are made negotiable, and placed on the same footing as bills of exchange. We are not aware of any statute expressly declaring that negotiable notes must be in writing. The statutes assume the existence of writing, and may probably be said to require writing. But, independently of this, contracts, to be negotiable, must necessarily be in writing.

<sup>1</sup> *Ante*, pp. 37, 61.

Besides the mere necessity of writing, these instruments are required by law to be in a particular form, but this is matter more properly for a work on negotiable instruments.

*Statutory Requirements of Form.*

The statutory requirements of form in simple contracts are mainly to be found in the statute of frauds, but before going into these we must notice some others which are not so general.

By act of congress assignments of patents and copyrights are required to be in writing.<sup>2</sup>

Ordinarily, a bill of exchange or other order for the payment of money may be accepted orally,<sup>3</sup> but by statute, in some states, this is changed, and the acceptance is required to be in writing.<sup>4</sup>

At common law, a contract of insurance need not necessarily be evidenced by a written policy, but, like other simple contracts for which no form is required by the legislature, may be entered into by word of mouth.<sup>5</sup> In some of the states, however, statutes have been enacted prescribing particular forms for such contracts.

In some of the states an acknowledgment of a debt barred by the statute of limitations is required to be in writing, and signed by the debtor, in order to take the debt out of the statute.

In some states, a promise by a person, after becoming of age, to

<sup>2</sup> Rev. St. U. S. §§ 4808, 4955. But see *Searle v. Hill*, 73 Iowa, 367, 35 N. W. Rep. 400, upholding a parol agreement to assign.

<sup>3</sup> *McPherson v. Walton* (N. J. Ch.) 11 Atl. Rep. 21; *Short v. Blount*, 99 N. C. 49, 5 S. E. Rep. 190; *Bruner v. Nisbett*, 31 Ill. App. 517; *Neuman v. Schroeder*, 71 Tex. 81, 8 S. W. Rep. 632 (collecting the cases).

<sup>4</sup> *Weinbauer v. Morrison* (Sup.) 2 N. Y. Supp. 544; *Garretson v. North Atchison Bank*, 39 Fed. Rep. 163, 47 Fed. Rep. 867 (under Missouri statute); *Ingle v. Davis*, 81 Ga. 766, 8 S. E. Rep. 192; *Hall v. Flanders*, 83 Me. 242, 22 Atl. 158; *Pfaff v. Cummings*, 67 Mich. 143, 34 N. W. Rep. 281.

<sup>5</sup> *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448; *Trustees, etc., v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402; *Nebraska & I. Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. Rep. 351; *Zell v. Herman F. & M. Ins. Co.*, 75 Wis. 521, 44 N. W. Rep. 828; *Woody v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362; *Putnam v. Home Ins. Co.*, 123 Mass. 324; *Security Fire Ins. Co. v. Kentucky M. & F. Ins. Co.*, 7 Bush (Ky.) 81; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. Rep. 840; *Stickley v. Mobile Ins. Co.*, 37 S. C. 56, 16 S. E. Rep. 280; *Howard Ins. Co. v. Owens* (Ky. App.) 21 S. W. Rep. 1037.

pay a debt contracted during his infancy, is required by statute to be in writing.<sup>1</sup>

In Kentucky, and possibly in other states, no person can be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal.<sup>2</sup>

In most, if not in all, the states there are statutes regulating the mode of conveying land, and requiring writing, together with other formalities. In some states a deed is required. This, however, is a matter more properly for a work on real property.

### STATUTE OF FRAUDS—IN GENERAL.

The famous statute of frauds and perjuries, 29 Car. II. c. 3, was enacted in England in 1677, during the reign of Charles the Second, and, as stated in its recital, had for its object the "prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." There is some doubt as to its authorship. It has been said to have been drawn by Lord Hale, but this is doubtful. It is more probable that the author was Lord Nottingham. At any rate, he himself once said: "I had some reason to know the meaning of this law, for it had its first rise from me, who brought in the bill into the lords' house, though it afterwards received some additions and improvements from the judges and civilians."<sup>3</sup>

The original statute, which is substantially followed by the statutes of most of our states, contains two sections—the fourth and the seventeenth—which affect the form of certain simple contracts.

The fourth section provides: "That no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract, or sale of lands, tenements, or hereditaments,

<sup>1</sup> Post, p. 248.

<sup>2</sup> First Nat. Bank v. Gaines, 87 Ky. 597, 9 S. W. Rep. 396.

<sup>3</sup> See Wain v. Warlters, 5 East, 17; Wyndham v. Chetwynd, 1 Burrows, 418; Ash v. Abdy, 3 Swanst. 664.

or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The seventeenth section provides: "That no contract for the sale of any goods, wares, and merchandises, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorized."

This statute has been substantially followed by the statutes of most of our states, but in some states the statute is materially different. These variations will be noticed as we go along.

As the seventeenth section differs materially from the fourth, it will be better to treat them separately. In doing so we will consider (1) the nature of the contracts specified in the statute, (2) the form required by the statute, and (3) the effect of failure to comply with its provisions.

#### STATUTE OF FRAUDS—CONTRACTS WITHIN SECTION 4— IN GENERAL.

**42. The statute does not apply to—**

- (a) Contracts created by law.
- (b) Instruments created under, and deriving their obligation from, special statutes.
- (c) Executed contracts.

Before taking up in turn the special contracts specified in this section of the statute, it is proper to state the kinds of contract generally to which the statute does not apply.

In the first place, it applies only to contracts made in fact; it does not include promises created by law. If a duty is imposed by law to pay money or perform other duties, without an agreement

or promise in fact, no writing is necessary to support an action on the implied assumpsit.<sup>10</sup>

Nor does the statute apply to such instruments as are created under, and derive their obligation from, special statutes, without the acceptance or assent of the party for whose ultimate benefit they are given,—as in the case of an undertaking on appeal, the requisites of which are prescribed by a special statute. In a case in which it was objected that an undertaking on appeal did not express a consideration as required by the statute of frauds, it was said: “What possible application has the statute designed to prevent frauds and perjuries in reference to common-law contracts to an undertaking, the contents and legal effect of which are written on the face of the statute? What fraud is to be suppressed, or perjury avoided, by making this appellant certify, under his signature, to a consideration which, if it exists at all, did not arise from the agreement of parties, but from a law which this court, and all others, are bound judicially to notice? At most it would be but cumulative evidence of the provisions of a statute.”<sup>11</sup>

Nor does the statute have any effect where the contract has been executed, for the purpose of the statute is to exclude parol evidence of the contracts within their provisions, and not to prohibit execution of oral contracts. It applies to executory contracts only.<sup>12</sup> We shall see, in treating of the particular kinds of contracts, that under some circumstances part performance may take them out of the statute.

<sup>10</sup> *Goodwin v. Gilbert*, 9 Mass. 510; *Arnold v. Garst*, 16 R. I. 4, 11 Atl. Rep. 167; *Pike v. Brown*, 61 Mass. 133; *Sage v. Wilcox*, 6 Conn., at page 84; *Smith v. Bradley*, 1 Root (Conn.) 150; *Howard v. Whitt* (Ky. App.) 2 S. W. Rep. 776. Post, p. 134, note 146.

<sup>11</sup> *Thompson v. Blanchard*, 3 N. Y. 335; *Doolittle v. Dininny*, 31 N. Y. 350.

<sup>12</sup> *Stone v. Dennison*, 13 Pick. (Mass.) 1; *Lord Bolton v. Tomlin*, 5 Adol. & El. 856; *Dodge v. Crandall*, 30 N. Y. 304; *Brown v. Farmers' L. & T. Co.*, 117 N. Y. 266, 22 N. E. Rep. 952; *Nutting v. McCutcheon*, 5 Minn. 382 (Gil. 310); *Schultz v. Noble*, 77 Cal. 79, 19 Pac. Rep. 182; *Stringer v. Montgomery*, 111 Ind. 489, 12 N. E. Rep. 474; *Swanzy v. Moore*, 22 Ill. 63; *James v. Morey*, 44 Ill. 352; *King v. Bushnell*, 121 Ill. 656, 13 N. E. Rep. 245; *Atchison, T. & S. F. R. Co. v. English*, 38 Kan. 110, 16 Pac. Rep. 82; *Central Tex., etc., Co. v. Weems*, 73 Tex. 252, 11 S. W. Rep. 270; *Webster v. Le Compte*, 74 Md. 249, 22 Atl. Rep. 232; *Baldock v. Atwood*, 21 Or. 78, 26 Pac. Rep. 1058;

Oral agreements, modifying prior written contracts, and new parol contracts after breach of original written contracts, are within the statute;<sup>13</sup> but it has been held that in an action on a written contract, required by the statute to be in writing, it is permissible to show a verbal contract waiving a particular provision of the contract.<sup>14</sup> As to this, however, there is some conflict.\*

#### **SAME—PROMISE BY EXECUTOR OR ADMINISTRATOR.**

**43.** The statute applies to "any special promise" of an executor or administrator "to answer damages out of his own estate." It applies only to promises—

- (a) To answer for debts or liabilities of the deceased, and
- (b) To answer for them out of the property of the promisor.

An executor or administrator may sue or be sued upon obligations devolving upon him as the representative of the deceased, and he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate; but in neither case is he bound to pay anything out of his own pocket. His liabilities are limited by the assets of the deceased. He may, however, if he chooses, pay money out of his own pocket, to save the credit of the deceased, or for any other reason, or make promises to answer for damages or pay debts—which is included in the expression, "answer damages"—out of his own estate; but, in order that the promise may be binding on him, it must be in writing, signed by him or his agent.

The statute only applies to promises to answer for debts or liabili-

*Pireaux v. Simon*, 79 Wis. 392, 48 N. W. Rep. 674; *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. Rep. 615; *Anderson School Tp. v. Milroy Lodge*, 130 Ind. 106, 29 N. E. Rep. 411; *Showalter v. McDonell*, 83 Tex. 158, 18 S. W. Rep. 491; *Harris v. Harper*, 48 Kan. 418, 29 Pac. Rep. 697; *Doherty v. Doe*, 18 Colo. 456, 33 Pac. Rep. 105; *Lagerfelt v. McKie* (Ala.) 14 South. Rep. 281.

\* *Abell v. Munson*, 18 Mich. 306; *Burns v. Fidelity Real-Estate Co.*, 52 Minn. 31, 53 N. W. Rep. 1017; *Thomson v. Poor* (Sup.) 10 N. Y. Supp. 597, 22 N. Y. Supp. 570; *Moritz v. Koenig*, 1 Misc. 186, 21 N. Y. Supp. 5; *Rucker v. Harrington*, 52 Mo. App. 481.

<sup>13</sup> *Lee v. Hawks*, 68 Miss. 609, 9 South. Rep. 828.

<sup>14</sup> *Post*, p. 620.



ties of the decedent. It does not apply to original undertakings by the executor or administrator, and a promise, therefore, by an executor to pay the heir money if he will forbear further opposition to the probate of the will, is not within the statute.<sup>18</sup> Nor does it apply to promises to pay debts of the decedent out of the assets of the estate.<sup>19</sup>

**SAME—PROMISE TO ANSWER FOR DEBT OF ANOTHER.**

**44.** The statute applies to "any special promise to answer for the debt, default, or miscarriage of another person." The following points should be noted:

(a) "Debt, default, or miscarriage" includes—

(1) Liabilities arising from torts as well as those arising from contracts, and

(2) Prospective as well as existing liabilities.

(b) The debt, default, or miscarriage must be that of "another person," and, therefore, for the statute to apply,

(1) There must be either a present or prospective primary liability of a third person for which the promisor agrees to answer. He must not himself be or become primarily liable.

(2) The liability of the third person, therefore, must continue.

(c) A promise which contemplates payment out of the debtor's property in the hands of the promisor is not within the statute.

(d) Nor is a promise made to the debtor to pay his debt. This generally includes contracts of indemnity, though, if the promise be to answer for another's debt, it is within the statute, notwithstanding it is in the form of a contract of indemnity.

<sup>18</sup> *Bellows v. Sowles*, 57 Vt. 164. And see *Fehlinger v. Wood* (Pa. Sup.) 19 Atl. Rep. 746; *Wales v. Stout*, 115 N. Y. 638, 21 N. E. Rep. 1027.

<sup>19</sup> *Stebbins v. Smith*, 4 Pick. (Mass.) 97; *Pratt v. Humphrey*, 22 Conn. 317.

- (e) Nor, according to the weight of authority, does the statute apply where the leading object of the promisor is to subserve some purpose of his own, and his promise is merely incidental.

*"Debt, Default, or Miscarriage."*

The words "debt, default, or miscarriage" include all liabilities of a third person, however they may arise, and therefore include liabilities arising out of a wrong or tort, as well as those arising out of contract.<sup>17</sup> They also include prospective as well as existing liabilities. "If the future primary liability of a principal is contemplated as the basis of the promise of a guarantor, such promise is within the statute of frauds, precisely as it would be if the liability existed when the promise was made."<sup>18</sup>

*"Of Another Person."*

The promise contemplated by the statute is a promise to answer for the debt, default, or miscarriage of "another person;" or, in other words, a contract of guaranty or suretyship. The statute does not apply to original promises or undertakings, though the benefit accrues to another than the promisor. There must be three parties in contemplation,—a person who is actually or prospectively liable to another person, and a third person who promises the creditor to answer for the debt or liability; or, in other words, a creditor, a principal debtor, and a guarantor of the debt, or surety. Though there is considerable conflict between the courts in their construction of this clause of the statute, the following rules for determining whether a contract comes within it are established by the weight of authority:

- (a) There must be either a present or prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself primarily, and not collaterally, liable,

<sup>17</sup> It was so held where the defendant had promised to pay the plaintiff a certain sum in consideration of the plaintiff's forbearance to sue a third party who had committed a tort by wrongfully riding and killing plaintiff's horse. *Kirkham v. Marter*, 2 Barn. & Ald. 613. And see *Turner v. Hubbell*, 2 Day (Conn.) 457; *Mountstephen v. Lakeman*, L. R. 7 Q. B. 202.

<sup>18</sup> *Mead v. Watson*, 57 Vt. 426. And see *Matson v. Wharam*, 2 Term R. 80; *Matthews v. Milton*, 4 Yerg. (Tenn.) 576.

the promise is not within the statute, though the benefit from the transaction accrues to a third person.<sup>19</sup> If, for instance, two persons come into a store, and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will," this is a collateral undertaking, and must be in writing; but if he says, "Let him have the goods, and I will pay," or "I will see you paid," and credit is given to him alone, he is himself the buyer, and the undertaking is original.<sup>20</sup> In other words, whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original;<sup>21</sup> but it is collateral if any credit was given to the other party.<sup>22</sup>

<sup>19</sup> *Baldwin v. Hiers*, 73 Ga. 739; *Morris v. Osterhout*, 55 Mich. 262, 21 N. W. Rep. 339; *De Witt v. Root*, 18 Neb. 567, 26 N. W. Rep. 360. Where an agent has become liable to his principal by lending money contrary to instructions, his guaranty of the loan is not within the statute. *Crane v. Wheeler*, 48 Minn. 207, 50 N. W. Rep. 1033. A promise by a married woman to pay her parent for her support was held a promise to pay her husband's debt. *Perkins v. Westcoat* (Colo. App.) 33 Pac. Rep. 139.

<sup>20</sup> *Birkmyr v. Darnell*, Salk. 27; *Hartley v. Varner*, 88 Ill. 561; *Nelson v. Boynton*, 3 Metc. (Mass.) 396; *Greene v. Burton*, 59 Vt. 423, 10 Atl. Rep. 575; *Gulan v. Reid*, 22 Ill. App. 165; *Higgins v. Hallock*, 60 Hun, 125, 14 N. Y. Supp. 550; *Boston v. Farr*, 148 Pa. St. 220, 23 Atl. Rep. 901; *Crowder v. Keys* (Ga.) 16 S. E. Rep. 980. The same is true where a person says, "If I am to do certain work for M., I must be assured of payment by some one," and the person addressed says, "Do it, and I will see you paid." *Mountstephen v. Lakeman*, L. R. 7 H. L. 17. And see cases cited above and in the following notes.

<sup>21</sup> *Chase v. Day*, 17 Johns. (N. Y.) 114; *Morris v. Osterhout*, 55 Mich. 262, 21 N. W. Rep. 339; *Larsen v. Ienson*, 53 Mich. 427, 19 N. W. Rep. 130; *Hartley v. Varner*, 88 Ill. 561; *Geary v. O'Neill*, 73 Ill. 593; *Hughes v. Atkins*, 41 Ill. 213; *Williams v. Corbet*, 28 Ill. 262; *Myer v. Grafflin*, 31 Md. 350; *Grant v. Wolf*, 34 Minn. 32, 24 N. W. Rep. 289; *Ellis v. Murray*, 77 Ga. 542; *Hake v. Solomon*, 62 Mich. 377, 28 N. W. Rep. 908; *Hagadorn v. Stronach Lumber Co.* (Mich.) 45 N. W. Rep. 650; *Peyson v. Conniff*, 32 Neb. 269, 49 N. W. Rep. 340; *Mackey v. Smith*, 21 Or. 598, 28 Pac. Rep. 974; *Hazeltine v. Wilson* (N. J. Sup.) 26 Atl. Rep. 79. Where defendant gave plaintiff directions to give his (defendant's) subcontractors material, and charge it to them, which was done, and every month he (defendant) would pay the bill, it was held not to show that credit was given the subcontractors, and that the undertaking was original. *Maurin v. Fogelberg*, 37 Minn. 23, 32 N. W. Rep. 858. And see *Owen v. Stevens*, 78 Ill. 462; *Schoenfeld v. Brown*, 78 Ill. 487.

<sup>22</sup> *Welch v. Marvin*, 36 Mich. 59; *Cahill v. Bigelow*, 18 Pick. 369; *Norris v.*

(b) Even though there is an existing liability of a third person for which the promisor undertakes to answer, still the promise is not within the statute if the terms are such that it effects an extinguishment of such liability; in other words, the liability of the original debtor must continue. A promise to pay another's debt in consideration of the creditor's doing something which will extinguish his claim against the debtor, and release him absolutely, need not be in writing.<sup>23</sup> To take the promise out of the statute, the original debtor's release must be absolute. If the creditor may still hold him liable at his option, the promise must be in writing.<sup>24</sup> Novations fall within this class of agreements.

Graham, 33 Md. 56; Northern Cent. Ry. Co. v. Prentiss, 11 Md. 119; Aldrich v. Lewis, 12 Vt. 125; Matthews v. Milton, 4 Yerg. (Tenn.) 576; Baldwin v. Hiers, 73 Ga. 739; Blank v. Dreher, 25 Ill. 331; Langdon v. Richardson, 58 Iowa, 610, 12 N. W. Rep. 622; Bugbee v. Kendrick, 130 Mass. 437; Mead v. Watson, 57 Vt. 426; Studley v. Barth, 54 Mich. 6, 19 N. W. Rep. 568; Robertson v. Hunter (S. C.) 6 S. E. Rep. 850; Harris v. Frank, 81 Cal. 280, 22 Pac. Rep. 856; Rottman v. Pohlmann, 28 Mo. App. 399; Clark v. Jones, 87 Ala. 474, 6 South. Rep. 362; Lindsey v. Heaton, 27 Neb. 662, 43 N. W. Rep. 420; Waters v. Shafer, 25 Neb. 225, 41 N. W. Rep. 181; Benbow v. SooySmith, 76 Iowa, 151, 40 N. W. Rep. 693; Chappell v. Barkley, 90 Mich. 35, 51 N. W. Rep. 351.

\* Goodman v. Chase, 1 Barn. & Ald. 297; Teeters v. Lamborn, 43 Ohio St. 144, 1 N. E. Rep. 513; Andre v. Bodman, 13 Md. 241; Meriden Britannia Co. v. Zingsen, 48 N. Y. 247; Curtis v. Brown, 5 Cush. (Mass.) 488; Wood v. Corcoran, 1 Allen (Mass.) 405; Mulcrone v. Lumber Co., 55 Mich. 622, 22 N. W. Rep. 67; Runde v. Runde, 59 Ill. 98; Corbin v. McChesney, 26 Ill. 231; Eddy v. Roberts, 17 Ill. 505; Whittemore v. Wentworth, 76 Me. 20; Green v. Solomon, 80 Mich. 234, 45 N. W. Rep. 87; Carlisle v. Campbell, 78 Ala. 247; Thornton v. Guice, 73 Ala. 321; Howell v. Field, 70 Ga. 502; Palmer v. Witcherly, 15 Neb. 98, 17 N. W. Rep. 364; Flagler v. Lipman, 2 Misc. Rep. 417, 21 N. Y. Supp. 946; Eden v. Chaffee (Mass.) 35 N. E. Rep. 675.

\* Nelson v. Boynton, 3 Metc. (Mass.) 396; Welch v. Marvin, 36 Mich. 59; Waggoner v. Gray, 2 Hen. & M. (Va.) 612; Willard v. Bosshard (Wis.) 32 N. W. Rep. 538; Hill v. Frost, 59 Tex. 25; Pfaff v. Cummings, 67 Mich. 143, 34 N. W. Rep. 281; Gray v. Herman, 75 Wis. 453, 44 N. W. Rep. 248; Murto v. McKnight, 28 Ill. App. 238; Miller v. Lynch, 17 Or. 61, 19 Pac. Rep. 845; Brant v. Johnson, 46 Kan. 389, 26 Pac. Rep. 735; Riegelman v. Focht (Pa. Sup.) 21 Atl. Rep. 601; Greene v. Latham, 2 Colo. App. 416, 81 Pac. Rep. 233. The fact that a lien against the original debtor is released has been held immaterial if the debtor himself remains liable. Nelson v. Boynton, *supra*;

(c) The promise must contemplate payment by the promisor out of his own property, or, at least, not out of the property of the debtor, from which, or from the proceeds of which, the promisor is under a duty to pay, or is authorized to pay; for in such a case the payment is, in effect, by the debtor. The statute has no application to "cases where the original debtor places property of any kind in the hands of a third person, and that person promises to pay the claims of a particular creditor of the debtor. The promise, in such case, is an original promise, and the property placed in his hands is its consideration. In this class of cases it is immaterial whether the liability of the original debtor continues or not."<sup>26</sup>

(d) A promise to pay another's debt, to come within the statute, must be made to the creditor, and not to the debtor. A promise to the debtor himself to pay his debt for him does not require writing.<sup>27</sup> Illustrations of this are where a person buys land or goods, and

*Mallory v. Gillett*, 21 N. Y. 412. See post, p. 100. A promise to pay another's debt merely if the promisee will forbear to sue the debtor, which he does, is within the statute. *Gump v. Halberstadt*, 15 Or. 356, 15 Pac. Rep. 467 (containing a collection of the cases on this point); *Watson v. Randall*, 20 Wend. (N. Y.) 201; *Rintoul v. White* (N. Y. App.) 15 N. E. Rep. 318. And see *Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. Rep. 539; *Dillaby v. Wilcox*, 60 Conn. 71, 22 Atl. Rep. 491; *Parker v. Dillingham*, 129 Ind. 542, 29 N. E. Rep. 23.

<sup>26</sup> *Wait v. Wait*, 28 Vt. 350. And see *Farley v. Cleveland*, 4 Cow. (N. Y.) 432; *Peck v. Goff* (R. I.) 25 Atl. Rep. 690; *Woodruff v. Scaife*, 83 Ala. 152, 3 South. Rep. 311; *Belknap v. Bender*, 75 N. Y. 446; *Ackley v. Parmenter*, 98 N. Y. 425; *Hughes v. Fisher*, 10 Colo. 383, 15 Pac. Rep. 702; *McCraith v. National Mohawk Val. Bank*, 104 N. Y. 414, 10 N. E. Rep. 862; *Fehlinger v. Wood* (Pa. Sup.) 19 Atl. Rep. 746; *Walden v. Karr*, Id. 49; *Fullam v. Adams*, 37 Vt. 391; *Sext v. Geise*, 80 Ga. 698, 6 S. E. Rep. 174; *Leake v. Ball*, 116 Ind. 214, 17 N. E. Rep. 918; *Sillsby v. Frost*, 3 Wash. T. 388, 17 Pac. Rep. 887; *Ledbetter v. McGhees*, 84 Ga. 227, 10 S. E. Rep. 727; *Mitts v. McMoran* (Mich.) 48 N. W. Rep. 288; *Dumanoise v. Townsend*, 80 Mich. 302, 45 N. W. Rep. 179; *Keyes v. Allen* (Vt.) 27 Atl. Rep. 319. But see *Gower v. Stuart*, 40 Mich. 747; *Frame v. August*, 88 Ill. 424.

<sup>27</sup> *Eastwood v. Kenyon*, 11 Adol. & El. 438; *Wendell v. Hudson*, 102 Ind. 521, 2 N. E. Rep. 303; *Alger v. Scoville*, 1 Gray (Mass.) 391, 395; *Harwood v. Jones*, 10 Gill & J. (Md.) 404; *Mersereau v. Lewis*, 25 Wend. 243; *Ware v. Allen* (Miss.) 1 South. Rep. 738; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. Rep. 427; *Clark v. Jones*, 85 Ala. 127, 4 South. Rep. 771; *Meyer v. Hartman*, 72 Ill. 442; *Rabberman v. Wiskamp*, 54 Ill. 179.

agrees to pay the purchase money to a creditor of the seller, or, as part of the consideration, assumes a mortgage or other indebtedness of the seller. This is no more than a promise to pay the promisor's own debt in a particular way.<sup>28</sup> Nor is a promise to indemnify or save another harmless from any liability which he may incur as the result of a transaction into which he enters at the instance of the promisor—as in the case of a promise to indemnify the promisee against loss from going bail for another—within the statute.<sup>29</sup> It is nothing more than a promise to pay a prospective debt of the promisee. It has been sought in some, if not most, of the books to distinguish between contracts within the statute and contracts of indemnity by saying without qualification that a promise of indemnity is not within the statute; but this may mislead. Such a promise to indemnify the promisee against any liability which he may incur as we have mentioned is not within the statute, but it is otherwise where the promise is to indemnify the promisee against any loss he may sustain by reason of the default or miscarriage of a person under liability to him.<sup>30</sup> A verbal acceptance of a bill

<sup>28</sup> *Wilson v. Bevans*, 58 Ill. 232; *Brown v. Strait*, 19 Ill. 88; *Clinton Nat. Bank v. Studemann*, 74 Iowa, 104, 37 N. W. Rep. 112; *Delp v. Brewing Co.* (Pa. Sup.) 15 Atl. Rep. 871; *Bateman v. Butler*, 124 Ind. 223, 24 N. E. Rep. 160; *Price v. Reid*, 38 Mo. App. 489; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. Rep. 937; *Skinker v. Armstrong*, 86 Va. 1011, 11 S. E. Rep. 977; *Nelswanger v. McClellan* (Kan.) 26 Pac. Rep. 18; *Morris v. Gaines*, 82 Tex. 255, 17 S. W. Rep. 538; *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. Rep. 677; *Mulvany v. Gross*, 1 Colo. 112, 27 Pac. Rep. 878; *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. Rep. 1117; *American Pencil Co. v. Wolfe*, 30 Fla. 360, 11 South. Rep. 488; *Scudder v. Carter*, 43 Ill. App. 252; *Plano Manuf'g Co. v. Burrows*, 40 Kan. 361, 19 Pac. Rep. 809; *Traders' Nat. Bank v. Clare*, 76 Tex. 47, 13 S. W. Rep. 183; *Elkin v. Timblin*, 151 Pa. St. 491, 25 Atl. Rep. 139.

<sup>29</sup> *Anderson v. Spence*, 72 Ind. 315; *Aldrich v. Ames*, 9 Gray (Mass.) 76; *Thomas v. Cook*, 8 Barn. & C. 728; *Beaman v. Russel*, 20 Vt. 205; *Barry v. Ransom*, 12 N. Y. 462; *Lerch v. Gallop*, 67 Cal. 595, 8 Pac. Rep. 322; *Reader v. Kingham*, 13 C. B. (N. S.) 344; *Wildes v. Dudlow*, L. R. 19 Eq. 198; *Keesling v. Frazier*, 119 Ind. 185, 21 N. E. Rep. 552; *Smith v. Delaney*, 64 Conn. 264, 29 Atl. Rep. 496; *Sutton v. Grey*, 69 Law T. 354, 9 Rep. (Feb.) 168. So, also, a promise made to a debtor to indemnify him against any claim arising from his debt is not within the statute, where the promisor does not become liable to the creditor. *Conkey v. Hopkins*, 17 Johns. (N. Y.) 113; *Weid v. Nichols*, 34 Mass. 538.

<sup>30</sup> *Nugent v. Wolfe*, 111 Pa. St. 471, 4 Atl. Rep. 15; *Mallory v. Gillett*, 21 N. Y. 412; *Cheesman v. Wiggins*, 122 Ind. 352, 23 N. E. Rep. 945; *Easter v.*

of exchange or other order for the payment of money is not within the statute.<sup>21</sup>

(e) When the leading object of the promisor is, not to become guarantor or surety for the debtor, but to subserve some purpose of his own, and his promise is merely incidental, it is not within the statute.<sup>22</sup> Under this rule the holder of a note or other security is bound by a verbal guaranty of its payment, made for the purpose of inducing another to purchase it;<sup>23</sup> and the promise by a *del credere* agent to his principal to guarantee the solvency of the persons to whom he sells goods is not within the statute.<sup>24</sup> Again, if a creditor has, or is about to file, a lien on property to secure his claim, and a third person, whose interests are or may be prejudiced thereby, guaranties the debt in consideration of a release of the lien or forbearance to file it, his object is to remove or prevent the lien, and the guaranty is merely incidental, and some courts hold that it need not be in writing,<sup>25</sup> though the weight of authority is prob-

White, 12 Ohio St. 219; Clements' Appeal, 52 Conn. 464. But see *Lerch v. Gallop*, 67 Cal. 595, 8 Pac. Rep. 322. A promise by one of the sureties on an official bond to indemnify a cosurety, who became such at his request, was held to be within the statute. *Wolverton v. Davis*, 85 Va. 64, 6 S. E. Rep. 619.

<sup>21</sup> Ante, p. 89.

<sup>22</sup> See *Little v. Edwards*, 69 Md. 499, 16 Atl. Rep. 134; *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. Rep. 58; *Mitchell v. Beck*, 88 Mich. 342, 50 N. W. Rep. 305; *First Nat. Bank v. Chalmers*, 120 N. Y. 658, 24 N. E. Rep. 848. An oral promise by an attorney to prosecute a suit and pay all the costs, and, if successful, to have half the amount recovered, otherwise nothing, was held not within the statute. *Willey v. Crane*, 69 Mich. 17, 36 N. W. Rep. 734. A contract of reinsurance has been held not within the statute. *Bartlett v. Fireman's Fund Ins. Co.*, 77 Iowa, 155, 41 N. W. Rep. 601. But see, contra, *Egan v. Fireman's Ins. Co.*, 27 La. Ann. 368.

<sup>23</sup> *Milks v. Rich*, 80 N. Y. 269; *Cardell v. McNeil*, 21 N. Y. 338; *Darst v. Bates*, 95 Ill. 493, at page 512. And see, in case of assignment and guaranty of judgment, *Little v. Edwards*, 69 Md. 499, 16 Atl. Rep. 134. So, also, where a person having property of his debtor to sell for payment of the debt guaranties the title to induce the promisee to buy it. *Farnham v. Chapman* (Vt.) 18 Atl. Rep. 152. But see *Dows v. Swett*, 134 Mass. 142.

<sup>24</sup> *Couturier v. Hastie*, 8 Exch. 40, 5 H. L. Cas. 673; *Sherwood v. Stone*, 14 N. Y. 207; *Wolff v. Koppel*, 5 Hill, 458, 2 Denio, 368; *Swan v. Nesmith*, 7 Pick. (Mass.) 220.

<sup>25</sup> *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Smith v. Exchange Bank*, 110 Pa. St. 508, 1 Atl. Rep. 760; *Wills v. Brown*, 118 Mass. 138; *Prime v. Koehler*,

ably to the contrary where the liability of the contractor is not **LAND**. And it has even been held that where the owner of the property in which the contractor has abandoned work, promises to pay for sale of tractor's workmen what is due them from the contractor, if he will go on with the work, the undertaking is original;<sup>77</sup> but the decision is a very doubtful one. The contrary has repeatedly been held.<sup>78</sup>

#### **SAME—AGREEMENTS IN CONSIDERATION OF MARRIAGE.**

**45. The statute applies to "any agreement made upon consideration of marriage."**

This clause of the statute does not apply to a promise to marry, the consideration for which is, not the marriage, but the promise of

77 N. Y. 91; *Dunlap v. Thorne*, 1 Rich. (S. C.) 213; *Shook v. Vanmater*, 22 Wis. 507; *Crawford v. King*, 54 Ind. 6; *Holt v. Smith* (Iowa) 39 N. W. Rep. 81; *Rogers v. Empkie Hardware Co.*, 24 Neb. 653, 39 N. W. Rep. 844; *Scott v. White*, 71 Ill. 287; *Borchsenius v. Canutson*, 100 Ill. 82; *Power v. Rankin*, 114 Ill. 52, 29 N. E. Rep. 185; *Wooten v. Wilcox*, 87 Ga. 474, 13 S. E. Rep. 595; *Flagler v. Lipman*, 20 N. Y. Supp. 878.

<sup>78</sup> *Nelson v. Boynton*, 3 Metc. (Mass.) 396; *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Mallory v. Gillett*, 21 N. Y. 412; *Bunneman v. Wagner*, 16 Or. 433, 18 Pac. Rep. 841; *Clark v. Jones*, 85 Ala. 127, 4 South. Rep. 771; *Stewart v. Jerome*, 71 Mich. 201, 38 N. W. Rep. 805; *Warner v. Willoughby*, 60 Conn. 468, 22 Atl. Rep. 1014; *Simpson v. Harris* (Nev.) 31 Pac. Rep. 1009.

<sup>79</sup> *Andre v. Bodman*, 13 Md. 241 (in this case the claim against the contractor, it seems, was given up, so that there no longer existed any primary liability of a third person); *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. Rep. 80; *Greenough v. Eichholtz* (Pa. Sup.) 15 Atl. Rep. 712; *Yeoman v. Mueller*, 33 Mo. App. 343; *Buchanan v. Moran*, 62 Conn. 83, 25 Atl. Rep. 396; *Snell v. Rogers* (Sup.) 24 N. Y. Supp. 379. And see *Sext v. Gelse*, 80 Ga. 698, 6 S. E. Rep. 174 (where the promise was to pay for material); *Bice v. Building Co.* (Mich.) 55 N. W. Rep. 382.

<sup>80</sup> See *Farnham v. Davis*, 79 Me. 282, 9 Atl. Rep. 725; *Greene v. Latham*, 2 Colo. App. 416, 31 Pac. Rep. 233; *Hutton Bros. v. Gordon*, 23 N. Y. Supp. 770. Where a widow, continuing her deceased husband's business, promised her husband's creditor to pay his debt if he would sell her goods on credit, the promise was held to be within the statute. *Ruppe v. Peterson*, 67 Mich. 437, 35 N. W. Rep. 82. And see *Derringer v. Moynihan* (Com. Pl. N. Y.) 10 N. Y. Supp. 540.



of exchange or other ~~but~~ to promises in consideration of, or conditional the statute.<sup>41</sup>

(e) When ~~the~~ actually taking place, such as promises to pay guarantor make a settlement of property, if the marriage is con- his own d.<sup>40</sup> An agreement between a man and woman that on stat marriage the survivor shall take no interest in the property the other, has been held to be a contract in consideration of marriage.<sup>41</sup> On the other hand, an oral contract between a man and woman, by which the man was to provide for the comfort and support of the woman during life, pay her debts, take care of, manage, and improve certain land so as to make it productive, and to that end that the parties should marry and live together on the land, which should be conveyed by the woman to the man in fee simple, was held not to be within the statute, on the ground that the consideration for the conveyance of the land was the provision for the support and comfort of the woman, and not the marriage.<sup>42</sup>

The marriage of the parties is not such part performance as will take an antenuptial contract out of the operation of the statute.<sup>43</sup>

<sup>40</sup> *Clark v. Pendleton*, 20 Conn. 495; *Short v. Stotts*, 58 Ind. 29; *Blackburn v. Mann*, 85 Ill. 222; *Ogden v. Ogden*, 1 Bland (Md.) 284. It is said in a Kentucky case: "It would be imputing to the legislature too great an absurdity to suppose that they had enacted that all our courtships, to be valid, must be in writing." *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94.

<sup>41</sup> *Caton v. Caton*, L. R. 1 Ch. App. 137; *Ogden v. Ogden*, 1 Bland (Md.) 284; *Crane v. Gough*, 4 Md. 318; *Henry v. Henry*, 27 Ohio St. 121; *Finch v. Finch*, 10 Ohio St. 507; *Deshon v. Wood*, 148 Mass. 132, 19 N. E. Rep. 1; *Chase v. Fitz*, 132 Mass. 359; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. Rep. 397; *Flenner v. Flenner*, 29 Ind. 564; *Caylor v. Roe*, 99 Ind. 1; *Lloyd v. Fulton*, 91 U. S. 479. A contract by which each party is to retain the title to his or her property, and dispose of it as if unmarried, is within the statute. *Mallory v. Mallory* (Ky.) 17 S. W. 737.

<sup>42</sup> *Carpenter v. Commings* (Sup.) 4 N. Y. Supp. 947. See, also, *Ennis v. Ennis*, 48 Hun, 11. So, also, in case of an agreement that certain property shall go to the survivor. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. Rep. 157. And see *White v. Bigelow*, 154 Mass. 593, 28 N. E. Rep. 904; *Adams v. Adams*, 17 Or. 247, 20 Pac. Rep. 633.

<sup>43</sup> *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. Rep. 615.

<sup>44</sup> *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. Rep. 157. And see *Johnstone v. Mappin*, 60 Law J. Ch. 241; *Flenner v. Flenner*, 29 Ind. 564; *Manning v. Riley* (N. J. Ch.) 27 Atl. Rep. 810.

**SAME—AGREEMENTS RELATING TO LAND.**

**46.** The statute applies to every "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." The following general rules may be mentioned:

- (a) The contract must be for a substantial interest in land, and not for arrangements preliminary to acquiring an interest, nor for a remote or inappreciable interest.
- (b) *Fructus industriales*, or crops and other products of land, raised by labor and cultivation, are not land, nor an interest therein.
- (c) *Fructus naturales*, or the natural growth and products of land, are an interest in land if they are sold with the understanding that title is to pass before severance, but not if the title is not to pass until after severance.
- (d) A mere license to enter on land is not an interest in land; but it is otherwise with an easement.

**47.** The statutes of some of the states vary more or less from the English statute, so the student must consult the statute of his particular state.

The treatment of this clause of the statute belongs more properly to a work on the law of real property, and we need only state the rules governing its application in a general way. The terms "lands," "tenements," and "hereditaments" have a clearly-defined meaning in the law of real property. They are used to denote the subjects of real property, as distinguished from personal property, or goods and chattels. It would seem that there should be little difficulty in determining whether a contract is within the clause, but the reverse is the case. A contract to sell or lease a house, or a tract of land, would clearly be within the statute, but when the contract is to sell something attached to the house or the land, there is some difficulty.<sup>44</sup>

<sup>44</sup> The statute does not apply to a contract with a husband to build a house on his wife's land, and sell it to him. *Coleman v. Curtis*, 36 S. C. 607, 15 S. E.

A contract, to require writing as being for an interest in land, must be for a substantial interest, and not for arrangements preliminary to the acquisition of an interest, nor for a remote and inappreciable interest.<sup>46</sup> An agreement for a lease of land would

Rep. 709, and 16 S. E. Rep. 770. An agreement in relation to a party wall has been held within the statute. *May v. Prendergast*, 12 Pa. Co. Ct. R. 220. The rule that partnership land is, under some circumstances, treated in equity as personal property, cannot operate to defeat the statute. *Carothers v. Alexander* (Tex. Sup.) 12 S. W. Rep. 4.

\* *Waters v. McGuigan*, 72 Wis. 155, 39 N. W. Rep. 382. An oral agreement between adjoining landowners, settling a dispute as to the boundary line between them, has been held not within the statute. *Jenkins v. Trager*, 40 Fed. Rep. 726; *Archer v. Helm* (Miss.) 11 South. Rep. 3; *Ferguson v. Crick* (Ky.) 23 S. W. Rep. 668; *Lecomte v. Toudouze*, 82 Tex. 208, 17 S. W. Rep. 1047; *Grigsby v. Combs* (Ky.) 21 S. W. Rep. 37; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Sheets v. Sweeny*, 136 Ill. 336, 26 N. E. Rep. 648; *Atchison v. Pease*, 96 Mo. 566, 10 S. W. Rep. 159; *Hills v. Ludwig*, 46 Ohio St. 373, 24 N. E. Rep. 596. The contrary has also been held. *Camp v. Camp*, 59 Vt. 667, 10 Atl. Rep. 748. Such an agreement is within the statute, where the true boundary is known or fixed by a deed, and the purpose is to convey additional land by fixing the boundary at another place. *Weeks v. Martin*, 10 N. Y. Supp. 656; *Jenkins v. Trager*, 40 Fed. Rep. 726; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. Rep. 1083; *Buckner v. Anderson*, 111 N. C. 572, 16 S. E. Rep. 424. Where the agreement is executed by taking possession. *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S. E. Rep. 400. As to ratification of an agreement, see *Cavanaugh v. Jackson*, 91 Cal. 580, 27 Pac. Rep. 931; *Smith v. Schiele*, 93 Cal. 144, 28 Pac. Rep. 857. It has been held that where two execution creditors levy on the same land, and then agree that it shall be sold under one of the executions, and the proceeds divided, this is not a sale, but a compromise, and therefore not within the statute. *Mygatt v. Tarbell*, 78 Wis. 351, 47 N. W. Rep. 618. An agreement by an heir with his ancestor to release his expectations is within the statute. *Brands v. De Witt*, (N. J. Err. & App.) 14 Atl. Rep. 894. So, also, is an agreement by a vendee under an executory contract of sale to surrender to his vendor his interest under the contract. *Dougherty v. Catlett*, 129 Ill. Sup. 431, 21 N. E. Rep. 932. An agreement, on the sale of land, for abatement of price in case of a deficiency, is not within the statute. *McGee v. Craven*, 106 N. C. 351, 11 S. E. Rep. 375; *Haviland v. Sammis*, 62 Conn. 44, 25 Atl. Rep. 394. Nor is an agreement by which a party promises to pay another a certain sum per acre for all the land the latter shall examine and advise the former to buy. *Wilson v. Morton*, 85 Cal. 598, 24 Pac. Rep. 784. Agreement between adjoining land owners as to building of partition fence. *Rudisill v. Cross* (Ark.) 16 S. W. Rep. 575. Oral agreement to arbitrate as to land. *Fort v. Allen*, 110 N. C. 183, 14 S. E. Rep. 685. Rent being an incident to the ownership of land, an assignment of rent must be in writing. *King v. Kaiser*, 3 Misc. Rep. 523, 23

be a contract for an interest in land,<sup>46</sup> but an agreement to pay for an examination of title with a view to purchasing land, or to furnish another with money with which to buy land would not be within the statute,<sup>47</sup> nor would an agreement to transfer shares of stock in a railroad company or other corporation, which, though the company may own land, do not give any appreciable interest therein to the individual shareholders.\*

It seems also to be well settled, in this country at least, that an agreement between landlord and tenant for the sale or surrender of fixtures placed upon the land by the tenant is not a sale of an interest in land, but is a contract for work and materials.<sup>48</sup>

According to the weight of authority, agreements for partnership dealings in land—that is, agreements under which the parties are to buy land for the purpose of selling it again, and dividing the profits or losses—are not within the statute.<sup>49</sup>

N. Y. Supp. 21. Agreement to devise land. *Gould v. Mansfield*, 103 Mass. 408; *Hale v. Hale* (Va.) 19 S. E. Rep. 739; *In re Kessler's Estate* (Wis.) 69 N. W. Rep. 129; *Grant v. Grant*, 63 Conn. 530, 29 Atl. Rep. 15.

\**Potter v. Arnold*, 15 R. I. 350, 5 Atl. Rep. 379. Assignment of a lease the unexpired term of which is more than a year. *Chicago Attachment Co. v. Davis Sewing-Mach. Co.* (Ill. Sup.) 25 N. E. Rep. 669, 23 N. E. Rep. 959, and 31 N. E. Rep. 438.

\**Horne v. Frazier*, 65 Md. 1, 4 Atl. Rep. 133. An agreement by an agent to buy land in his own name for the benefit of his principal is not within the statute. *Baker v. Wainwright*, 36 Md. 336. An oral ratification by a landowner of his agent's contract to sell land is valid. *Smith v. Schiele*, 93 Cal. 144, 28 Pac. Rep. 857. A parol partition is not within the statute. *Meacham v. Meacham*, 91 Tenn. 532, 19 S. W. Rep. 757; *Wolf v. Wolf* (Pa. Sup.) 23 Atl. Rep. 164. Nor is an agreement not to use land for a particular purpose. *Hall v. Solomon*, 61 Conn. 476, 23 Atl. Rep. 876.

\**Anson*, Cont. 61. But see *Driver v. Broad*, 4 Rep. 411; *Id.* [1893] 1 Q. B. 744.

\**South Baltimore Co. v. Muhlbach*, 69 Md. 395, 16 Atl. Rep. 117; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272; *Scoggin v. Slater*, 22 Ala. 687; *Cassell v. Collins*, 23 Ala. 676; *Zickafosse v. Hulick*, 1 Morris (Iowa) 175; *Clark v. Schultz*, 4 Mo. 235; *Green v. Vardiman*, 2 Blackf. (Ind.) 324.

\**McElroy v. Swope*, 47 Fed. Rep. 380; *Davis v. Gerber*, 69 Mich. 246, 37 N. W. Rep. 281; *Petrie v. Torrent*, 88 Mich. 43, 49 N. W. Rep. 1076; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. Rep. 84; *Howell v. Kelly*, 149 Pa. St. 473, 24 Atl. Rep. 224; *Gardner v. Randell*, 70 Tex. 453, 7 S. W. Rep. 781; *Van Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. Rep. 883; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. Rep. 370; *Meagher v. Reed*, 14 Colo. 335, 24 Pac. Rep. 681; *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. Rep. 283; *Fountain v. Menard* (Minn.) 55 N. W. Rep. 601; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. Rep. 605;

*Crops and Other Products of Land.*

Probably the chief question of interest with reference to this subject relates to the sale of crops and other products of land. As to these a distinction has been drawn between what are called "emblemments," or "fructus industriales," such as crops of wheat, corn, vegetables, and the like, which are obtained by labor and cultivation, and "fructus naturales," such as growing grass, timber, fruit upon trees, ores in the ground, uncut ice, and the like, produced by the power of nature alone.

Fructus industriales are not regarded as "lands, tenements, or hereditaments," nor as an interest therein, but as personal property; and are not within the statute.<sup>60</sup> Fructus naturales, on the contrary, are, as a general rule, considered to constitute such an interest so long as they are unsevered, and a contract for their sale, which contemplates the passing of the property therein before the severance, is within the statute; but it is otherwise if the title is not to pass until after they are severed, though they are growing or attached at the time the contract is made. As to this matter, however, there is much conflict.<sup>61</sup>

*Case v. Seger*, 4 Wash. St. 492, 30 Pac. Rep. 646; *Coffin v. McIntosh* (Utah) 34 Pac. Rep. 247. But see *Young v. Wheeler*, 34 Fed. Rep. 98; *Raub v. Smith*, 61 Mich. 543, 28 N. W. Rep. 678; *Brosnan v. McKee*, 63 Mich. 454, 30 N. W. Rep. 107; *McKinnon v. McKinnon*, 46 Fed. Rep. 713; *Clarke v. McAuliffe*, 81 Wis. 104, 51 N. W. Rep. 83. An agreement between A. and B. to work a stone quarry together, and divide the profits, if B. can purchase land, to be paid for by A., to whom the deed is to be made, is not for an interest in land. *Treat v. Hiles*, 68 Wis. 344, 32 N. W. Rep. 517. An agreement by a person to purchase land with his own money, and divide with another, is within the statute. *Towle v. Wadsworth* (Ill. Sup.) 30 N. E. Rep. 602; *Robbins v. Kimball*, 55 Ark. 414, 18 S. W. Rep. 457; *Morton v. Nelson*, 145 Ill. 586, 32 N. E. Rep. 916; *Roughton v. Rawlings*, 88 Ga. 819, 16 S. E. Rep. 89.

\* *Evans v. Roberts*, 5 Barn. & C. 829; *Jones v. Flint*, 10 Adol. & El. 753; *Miller v. Baker*, 1 Metc. (Mass.) 27; *Whitmarsh v. Walker*, 1 Metc. (Mass.) 313; *Whipple v. Foot*, 2 Johns. (N. Y.) 418; *Ross v. Welch*, 11 Gray (Mass.) 235; *Northern v. State*, 1 Ind. 113; *Graff v. Fitch*, 58 Ill. 373; *Bull v. Griswold*, 19 Ill. 631; *Davis v. McFarlane*, 37 Cal. 634; *Marshall v. Ferguson*, 23 Cal. 65; *Purner v. Piercy*, 40 Md. 223. But see, contra, *Kerr v. Hill*, 27 W. Va. 576.

<sup>61</sup> *Smith v. Surman*, 9 Barn. & C. 561; *Drake v. Wells*, 11 Allen (Mass.) 141; *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Kilmore v. Howlett*, 48 N. Y. 569;

*Licenses and Easements.*

A mere license to enter upon land and do a particular act or series of acts,—as in the case of a license to enter upon land and remove property sold to the licensee,—is not an interest in land, within the statute. It is otherwise, however, where the right conferred is to enter upon lands and erect and maintain a dam thereon. This is more than a mere license; it is an easement. It is the transfer of an interest in the land, and must be in writing.<sup>52</sup> A right of way is an interest in land, and cannot be granted by parol.<sup>53</sup>

*Hirth v. Graham* (Ohio Sup.) 33 N. E. Rep. 90; *Morse v. Inhabitants of Wellesley*, 156 Mass. 95, 30 N. E. Rep. 77; *Marshall v. Green*, 1 C. P. Div. 35; *Giles v. Simonda*, 15 Gray (Mass.) 441; *White v. Foster*, 102 Mass. 375; *Osborn v. Rabe*, 67 Ill. 108; *Pattison's Appeal*, 61 Pa. St. 204; *McClintock's Appeal*, 71 Pa. St. 365; *Fletcher v. Livingston*, 153 Mass. 388, 26 N. E. Rep. 1001; *Slocum v. Seymour*, 36 N. J. Law, 138; *Hostetter v. Auman*, 119 Ind. 7, 20 N. E. Rep. 506; *Andrews v. Costican*, 30 Mo. App. 29. See, also, *Metzger v. Chicago, etc., Ry. Co.*, 76 Iowa, 387, 4 N. W. Rep. 49, and note in *Purner v. Piercy*, 17 Am. Rep. 595. But see, as to sale of growing timber, *Smith v. Bryan*, 5 Md. 141; *Sentman v. Gamble*, 69 Md. 293, 14 Atl. Rep. 673; *Claflin v. Carpenter*, 4 Metc. (Mass.) 580; *Poor v. Oakman*, 108 Mass. 309. Sale of fruit to be afterwards gathered. *Purner v. Piercy*, 40 Md. 223; *Vulicevich v. Skinner*, 77 Cal. 239, 19 Pac. Rep. 424; *Smock v. Smock*, 37 Mo. App. 56. A contract to peel and take away yearly a certain quantity of bark from growing trees, is held to be within the statute. *Thomson v. Poor*, 10 N. Y. Supp. 597, 22 N. Y. Supp. 570.

<sup>52</sup> See *Mumford v. Whitney*, 15 Wend. (N. Y.) 380. In the case cited the authorities are collected and discussed at length. See, also, *Whitmarsh v. Walker*, 1 Metc. (Mass.) 313; *Johnson v. Wilkinson*, 139 Mass. 8, 29 N. E. Rep. 62; *Taylor v. Waters*, 7 Taunt. 374; *Hayes v. Fine*, 91 Cal. 391, 27 Pac. Rep. 772; *Clanton v. Scruggs* (Ala.) 10 South. Rep. 757. Easement in portion of the water from a ditch. *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. Rep. 216. Agreement between railroads for joint use of the right of way of one not within the statute. *Alabama G. S. R. Co. v. South & N. A. R. Co.*, 84 Ala. 570, 3 South. Rep. 286. Nor is an agreement between telegraph companies for the use by one of the other's poles. *Farnsworth v. W. U. Tel. Co.*, 53 Hun, 636, 6 N. Y. Supp. 735. A right to drain water over another's land is said to be an interest in land. *Deyo v. Ferris*, 22 Ill. App. 154, 24 Ill. App. 416.

<sup>53</sup> *Bonelli v. Blakemore*, 66 Miss. 136, 5 South. Rep. 228.

*Statutes Varying from the English Statute.*

What we have thus far said as to this clause of the statute has been with reference to the original English statute and the statutes of those states in which it has been substantially followed. Attention should be called to the fact that in some states the statute is different. In Illinois, for instance, it applies to any contract for the sale of lands, etc., or any interest in or concerning them, "for a longer term than one year."<sup>44</sup>

**SAME—AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.**

48. The statute applies to "any agreement that is not to be performed within the space of one year from the making thereof." The following rules may be mentioned:

(a) The agreement must be impossible of performance within the year; and the statute therefore does not apply to—

- (1) Agreements for the performance of an act on the happening of a contingency that may possibly happen within a year.
- (2) Agreements for the performance of acts until the happening of such a contingency.
- (3) Agreements which, from their nature, will be fully performed, not merely terminated, on the happening of such a contingency, though it is not mentioned.
- (4) Agreements of which either party may require performance within a year.
- (5) It makes no difference how improbable is performance within the year, or that the agreement is not in fact performed until after a longer time.

(b) In some jurisdictions the agreement must contemplate nonperformance by both parties within the year.

<sup>44</sup> Rev. St. Ill. c. 59, § 2.

(c) In a few jurisdictions this clause of the statute does not apply to agreements relating to land.

*Possibility of Performance.*

In order that an agreement may fall within this clause of the statute, the parties must contemplate that it shall not be performed within a year. The mere fact that it may not be, or is not, performed within the year, does not bring it within the statute. It must appear, it has been said, that "it is to be performed after the year."<sup>55</sup> Further than this, the agreement must be impossible of completion within a year. If, by any possibility, it is capable of being completed within a year, it is not within the statute, though the parties may intend, and though it is probable, that it will extend over a longer period, and though it does in fact so extend.

The oral contracts that have been held enforceable under this rule may be classified as follows:

(a) Agreements for the performance of an act on the happening of a contingency which may possibly happen within a year,—as in the case of agreements to do something on the marriage or death of a person, without further specification as to time; or upon the return of a ship, which may return within a year, though it does not in fact return until a longer time has elapsed; or upon the happening of any other event which may happen at any time.<sup>56</sup>

<sup>55</sup> *Peter v. Compton*, 1 Smith, Lead. Cas. 335; *Bullock v. Turnpike Co.*, 85 Ky. 184, 3 S. W. Rep. 129; *Worley v. Sipe*, 111 Ind. 238, 12 N. E. Rep. 385; *Jones v. Pouch*, 41 Ohio St. 146; *Raynor v. Drew*, 72 Cal. 307, 13 Pac. Rep. 866; *Sarles v. Sharlow*, 5 Dak. 100, 37 N. W. Rep. 748; *Warren, etc., Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. Rep. 908; *Durham v. Hiatt*, 127 Ind. 514, 26 N. E. Rep. 401; *Sweet v. Desha L. & P. Co.*, 56 Ark. 629, 20 S. W. Rep. 514; *Heflin v. Milton*, 69 Ala. 354; *Niagara F. Ins. Co. v. Greene*, 77 Ind. 500; *Wardner v. Chartier*, 63 Tex. 36; *Cole v. Singerly*, 60 Md. 348. But see *Warner v. Texas & P. Ry. Co.*, 4 C. C. A. 673, 54 Fed. Rep. 922.

<sup>56</sup> *Kent v. Kent*, 62 N. Y. 560; *Jilson v. Gilbert*, 26 Wis. 637; *Udlike v. Tenbroeck*, 32 N. J. Law, 105; *Anonymous*, 1 Salk. 280; *Blake v. Cole*, 22 Pick. (Mass.) 97; *McPherson v. Cox*, 96 U. S. 404; *Cole v. Singerly*, 60 Md. 348; *Thomas v. Armstrong*, 86 Va. 323, 10 S. E. Rep. 6; *Bartlett v. Mystic River Corp.*, 151 Mass. 433, 24 N. E. Rep. 780; *Clark v. Pendleton*, 20 Conn. 495. A promise by a man to marry when he recovers his health,—*McConahay v. Griffey*, 82 Iowa, 564, 48 N. W. Rep. 983,—or when he returns from



(b) Agreements for the continuous performance of acts until the happening of a contingency which may possibly happen within a year,—as in the case of agreements to render services, or to support a person, or to pay money from time to time, during a person's life, or until a person's marriage, or until the happening of any other event which may possibly happen within a year.<sup>87</sup> In this class may be placed contracts that may be terminated at any time on notice, and contracts to perform acts so long as the other party may need such performance.<sup>88</sup>

(c) Agreements which, from their nature, and without mentioning any contingency, will be completely performed according to their terms and intention if a certain contingency shall happen within the year,<sup>89</sup>—as in the case of agreements to forbear from

a voyage from which he may or may not return within a year,—*Clark v. Pendleton*, 20 Conn. 495,—is not within the statute.

<sup>87</sup> *Kent v. Kent*, 62 N. Y. 560; *Heath v. Heath*, 31 Wis. 223; *Carr v. McCarthy* (Mich.) 38 N. W. Rep. 241; *Bell v. Hewitt*, 24 Ind. 280; *Harper v. Harper*, 57 Ind. 547; *McGregor v. McGregor*, L. R. 21 Q. B. Div. 424; *Dresser v. Dresser*, 35 Barb. (N. Y.) 573; *Hutchinson v. Hutchinson*, 46 Me. 154; *Atchison, T. & S. F. R. Co. v. English*, 38 Kan. 110, 16 Pac. Rep. 82; *East Line & R. R. Co. v. Scott*, 71 Tex. 703, 10 S. W. Rep. 99; *Stowers v. Hollis*, 83 Ky. 544; *Dailey v. Cain* (Ky.) 13 S. W. Rep. 424. Nor is an agreement to work for a company "for the term of five years, or so long as A. shall continue to be agent for the company." *Roberts v. Rockbottom Co.*, 7 Metc. (Mass.) 46. Nor an agreement to employ a person so long as he may be disabled from an injury which he has received. *East Tennessee, V. & G. R. Co. v. Staub*, 7 Lea (Tenn.) 397.

<sup>88</sup> *Trustees, etc., v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Walker v. Wilmington, C. & A. R. Co.*, 26 S. C. 80, 1 S. E. Rep. 366; *Klene v. Shaeffing*, 33 Neb. 21, 49 N. W. Rep. 773; *Blake v. Voight*, 11 N. Y. Supp. 716; *Id.*, 134 N. Y. 69, 31 N. E. Rep. 256. But see *Warner v. Texas & P. Ry. Co.*, 4 C. C. A. 673, 54 Fed. Rep. 922.

<sup>89</sup> An agreement by a railroad company to maintain cattle guards in consideration of a right of way is not within the statute, since it may cease to use the right of way before expiration of a year. *Arkansas M. R. Co. v. Whitley*, 54 Ark. 199, 15 S. W. Rep. 465. A parol contract of partnership, without any fixed time for continuance, and the business of which may be completed within a year, is not within the statute. *Jordan v. Miller*, 75 Va. 442; *Treat v. Hiles*, 68 Wis. 344, 32 N. W. Rep. 517. It is otherwise if the partnership is to be continued beyond a year. *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. Rep. 280. And see, on the rule stated in the text, *Frazer v. Gates*, 118 Ill. 99, 1 N. E. Rep. 817; *Dailey v. Cain* (Ky.) 13 S. W. Rep. 424.

personally doing certain acts for an indefinite time, or for a number of years, and which would be fully performed if the promisor should die within the year;<sup>60</sup> or of agreements to educate or support a child until a certain age, at which he will not arrive for several years, or for an indefinite time, and which would be completely performed if the child should die within the year.<sup>61</sup> The agreement, to come within this class, must be such that it will be fully "performed" on the happening of the contingency, and not merely terminated. If it cannot be fully performed within the year, the fact that it may be terminated, or that further performance may be excused or rendered impossible, is not sufficient to take it out of the statute.<sup>62</sup>

"Under this rule it has been repeatedly held that an agreement not to carry on a certain business at a particular place was not within the statute, "because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his personal representatives, it would be fully performed if he died within the year." *Doyle v. Dixon*, 97 Mass. 208; *Lyon v. King*, 11 Metc. (Mass.) 411; *Worthy v. Jones*, 11 Gray (Mass.) 168; *Hill v. Jamieson*, 16 Ind. 125; *Richardson v. Pierce*, 7 R. I. 330. And it is immaterial in such cases that the agreement specifies that the promisor is to forbear for a certain number of years, "for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life." *Doyle v. Dixon*, *supra*.

\* *Peters v. Westborough*, 19 Pick. (Mass.) 364; *Ellicott v. Peterson*, 4 Md. 476; *Woolbridge v. Stern*, 42 Fed. Rep. 311; *Taylor v. Deseve*, 81 Tex. 246, 16 S. W. Rep. 1006.

\* *Doyle v. Dixon*, *supra*. For this reason it has been held that an agreement to employ a boy for five years, and to pay his father certain sums at stated periods during that time, was within the statute; for though, by the death of the boy, the services which were the consideration of the promise would cease, and the promise therefore be determined, it would not be completely performed. *Hill v. Hooper*, 1 Gray (Mass.) 131. And see *Washington, etc., Packet Co. v. Sickles*, 5 Wall. 580, in which it was held that an agreement for the use of an invention on a boat for a number of years was within the statute, though by loss or destruction of the vessel it might terminate within a year. "The possibility of defeasance," said the court, "does not make it the less a contract not to be performed within the year." And so, according to the weight of authority, an agreement for personal services for a period of more than one year is within the statute, for, on the death of either party, it would be terminated, and not fully performed. *Williams*

(d) Agreements of which performance may be required within a year if either party so chooses, though neither intends to require performance, and neither in fact requires it, until after expiration of the year.<sup>63</sup>

*Part Performance within a Year.*

Another rule, which is established in England and in most of our states, is that an agreement does not fall within the statute if that which one of the parties is to do is all to be performed within a year; in other words, the agreement must contemplate nonperformance by both parties within the year.<sup>64</sup> A part performance by one of the parties, however, will not take the agreement out of the statute.<sup>65</sup>

*v. Bemis*, 108 Mass. 91; *Lee's Adm'r v. Hill*, 87 Va. 497, 12 S. E. Rep. 1052; *Day v. New York Cent. R. Co.*, 51 N. Y. 583, 590; *Haynes v. Mason*, 30 Ill. App. 85; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421. *Contra*, *Pennsylvania Co. v. Dolan* (Ind. Sup.) 32 N. E. Rep. 802. In such cases, where the employe is discharged or quits the employment, after part performance, he may recover for what he has done, not on the contract, but on an implied assumpsit. Cases cited *supra*; *Baker v. Lauterbach*, 68 Md. 64, 11 Atl. Rep. 703. See, also, *post*, p. 134. If the term of employment is indefinite, the contract is not within the statute. See, also, *Dobson v. Collis*, 1 Hurl. & N. 81.

\* *Hausmann v. Burnham*, 59 Conn. 117, 22 Atl. Rep. 1065; *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. Rep. 326; *Walker v. Johnson*, 96 U. S. 424; *Connolly v. Giddings* (Neb.) 37 N. W. Rep. 939. A contract intended to be performed within a year is not within the statute, though before the year expires it is extended six months. *Ward v. Matthews*, 73 Cal. 13, 14 Pac. Rep. 604; *Donovan v. Richmond*, 61 Mich. 467, 28 N. W. Rep. 516. A written lease for more than a year, but with less than a year to run, may be modified by parol. *Doherty v. Doe* (Colo. Sup.) 33 Pac. Rep. 165.

\* *Donellan v. Read*, 3 Barn. & Adol. 899; *Bracegirdle v. Heald*, 1 Barn. & Ald. 722; *Harwood v. Jones*, 10 Gill & J. (Md.) 404; *Horner v. Frazier*, 65 Md. 1, 4 Atl. Rep. 133; *McClellan v. Sanford*, 26 Wis. 596; *Washburn v. Dosch*, 68 Wis. 436, 32 N. W. Rep. 551; *Blanding v. Sargent*, 33 N. H. 239; *Wolke v. Fleming*, 103 Ind. 110, 2 N. E. Rep. 325; *Winters v. Cherry*, 78 Mo. 344; *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. Rep. 78; *Durfee v. O'Brien*, 16 R. I. 213, 14 Atl. Rep. 857; *Dant v. Head* (Ky.) 13 S. W. Rep. 1073; *Berry v. Doremus*, 30 N. J. Law, 399; *Piper v. Foster*, 121 Ind. 407, 23 N. E. Rep. 269; *Smock v. Smock*, 37 Mo. App. 56; *Holbrook v. Armstrong*, 10 Me. 31; *Grace v. Lynch*, 80 Wis. 166, 49 N. W. Rep. 751; *Worden v. Sharp*, 56 Ill. 104; *Curtis v. Sage*, 35 Ill. 22.

\* See *Osborne v. Kimball*, 41 Kan. 187, 21 Pac. Rep. 163; *Shumate v. Far-*

Some of the states, however, have refused to recognize this rule, and hold that, even though all that is to be done by one of the parties is to be fully done within a year, the agreement is nevertheless within the statute, if the other party's promise is not to be performed within the year;<sup>68</sup> and in these states no recovery can be had on the contract by the party who has performed his part, though he may sue on the promise implied on the part of the other party from his acceptance of the benefits of such performance.<sup>69</sup>

It is held in Illinois that an agreement which is to be fully performed within the year, except for the mere payment of money, is not within the statute; the party to whom the money is payable having performed on his part.<sup>70</sup>

#### *Particular Contracts.*

According to the weight of authority, this clause of the statute applies to promises to marry which are, by their terms, to be performed after the expiration of a year.<sup>71</sup>

It has, however, been held in England, and in some of our states, that it does not apply to contracts relating to land.<sup>72</sup> Mr. Browne, in his work on the Statute of Frauds, takes the contrary view, and says that "it includes all those contracts which are of such dura-

low, 125 Ind. 359, 25 N. E. Rep. 432; *Baker v. Coddington*, 18 N. Y. Supp. 159; *Warner v. Texas & P. Ry. Co.*, 4 C. C. A. 673, 54 Fed. Rep. 922; *Hartwell v. Young*, 22 N. Y. Supp. 486. In Wisconsin, part payment at or before the time of the contract will take it out of the statute. *Washburn v. Dosch*, 68 Wis. 436, 32 N. W. Rep. 551.

<sup>68</sup> *Whipple v. Parker*, 29 Mich. 369; *Marcy v. Marcy*, 9 Allen (Mass.) 8; *Frary v. Sterling*, 99 Mass. 461; *Pierce v. Paine*, 28 Vt. 34; *Sheedy v. Adarene*, 41 Vt. 541; *Lane v. Shackford*, 5 N. H. 130; *Montague v. Garnett*, 3 Bush (Ky.) 297; *Bartlett v. Wheeler*, 44 Barb. (N. Y.) 162; *Broadwell v. Getman*, 2 Denio (N. Y.) 87; *Wilson v. Ray*, 13 Ind. 1; *McElroy v. Ludlum*, 32 N. J. Eq. 828.

<sup>69</sup> *Whipple v. Parker*, 29 Mich. 369. See, also, post, p. 134, note 146; ante, p. 24.

<sup>70</sup> *Curtis v. Sage*, 35 Ill. 22; *Worden v. Sharp*, 56 Ill. 104.

<sup>71</sup> *Derby v. Phelps*, 2 N. H. 515; *Clark v. Pendleton*, 20 Conn. 495; *Laurence v. Cook*, 56 Me. 187; *Nichols v. Weaver*, 7 Kan. 373.

<sup>72</sup> *Hollis v. Edwards*, 1 Vern. 159; *Fall v. Hazelregg*, 45 Ind. 576; *Sobey v. Brisbee*, 20 Iowa, 105; *Young v. Dake*, 5 N. Y. 463; *Wilson v. Martin*, 1 Denio, 602; *Railsback v. Walke*, 81 Ind. 409.

tion, whatever be their subject-matter."<sup>71</sup> We have been unable to find any case in which the point seems to have been directly raised and decided in accordance with Mr. Browne's statement, but there are many cases which assume that the statute applies to agreements relating to land. For instance, some courts hold that a parol lease for a year, to commence on a future day, is within this clause of the statute.<sup>72</sup> In some of the states the statute in regard to contracts relating to land excepts from its operation "leases for a term not exceeding one year," and "contracts for the leasing for a period not longer than one year," and in some states it is held that such a statute does not apply to agreements for a lease for a year to commence in the future.<sup>73</sup> A contract for services for one year, to commence at a future day, is within the statute,<sup>74</sup> even though it is to commence on the day after the contract is made;<sup>75</sup> but it is otherwise if it is to commence on the day the contract is entered into.<sup>76</sup>

#### FORM REQUIRED BY SECTION 4.

49. The statute provides that no action shall be brought on the contracts specified, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the

<sup>71</sup> Browne, St. Frauds, § 272.

<sup>72</sup> Delano v. Montague, 4 Cush. (Mass.) 42; Wheeler v. Frankenthal, 78 Ill. 124; Comstock v. Ward, 22 Ill. 248; Olt v. Lohnas, 19 Ill. 576; Roberts v. Tennell, 3 T. B. Mon. (Ky.) 247; Wilson v. Martin, 1 Denio (N. Y.) 602; Atwood v. Norton, 31 Ga. 507; Strehl v. D'Evers, 68 Ill. 77; Jellett v. Rhode (Minn.) 45 N. W. Rep. 13; White v. Holland, 17 Or. 3, 3 Pac. Rep. 573; Beller v. Devall, 40 Mo. App. 251; White v. Levy, 93 Ala. 484, 9 South. Rep. 164; Cook v. Redman, 45 Mo. App. 397.

<sup>73</sup> Whiting v. Ohlert, 52 Mich. 462, 18 N. W. Rep. 219; Young v. Dake, 5 N. Y. 463; McCray v. Torey, 66 Miss. 233, 5 South. Rep. 392; Goldberg v. Lovinski, 22 N. Y. Supp. 552. Contra, Greenwood v. Strother (Ky.) 16 S. W. Rep. 138.

<sup>74</sup> Townsend v. Minford, 1 N. Y. Supp. 565; Lee's Adm'r v. Hill, 87 Va. 497, 12 S. E. Rep. 1052; Baker v. Coddling, 18 N. Y. Supp. 159.

<sup>75</sup> Billington v. Cahill, 51 Hun, 132, 4 N. Y. Supp. 660.

<sup>76</sup> Cox v. Albany Brewing Co., 53 Hun, 634, 6 N. Y. Supp. 841; Aiken v. Nogle, 47 Kan. 96, 27 Pac. Rep. 825.

party to be charged or some other person thereunto by him lawfully authorized."

**50. To meet this requirement—**

- (a) The writing must show the parties, either by naming them or so describing them that they may be identified by parol evidence.
- (b) It must show all the terms of the agreement.
- (c) It must show the subject-matter, to such an extent, at least, that it can be identified by parol evidence.
- (d) In some jurisdictions, but not in others, the consideration must be shown.
- (e) It may consist of various letters or other papers, but they must be—
  - (1) Connected. By the weight of authority the connection cannot be shown by parol evidence, though a paper referred to in another may be identified by parol.
  - (2) Consistent.
  - (3) Complete.
- (f) It must be signed by the party to be charged or his agent.
  - (1) Some courts require contracts consisting of mutual promises to be signed by both parties.
  - (2) The signature, except where "subscription" is required, may be by mark, initials, printing, etc., and may be in any part of the writing.
  - (3) One party cannot sign as agent for the other.
  - (4) An auctioneer may sign as agent for both parties.
- (g) There need be no delivery, though nondelivery may tend to show that no agreement was concluded.

As we shall presently show, the form required by this section of the statute does not go to the existence of the contract, but is evidentiary only. It is not, as in the case of a deed, an integral part of the contract itself. The contract exists, though it may not be clothed with the necessary form; and the effect of noncompliance with the provisions of the statute is simply that no action can be brought until the omission is made good, for the contract cannot be proved.

For this reason the memorandum or note in writing required by the statute may be made at any time between the formation of the contract and the commencement of an action thereon.<sup>77</sup> The writing need not be intended as a formal contract.<sup>78</sup> All that is required is written evidence of the agreement, and therefore the memorandum may consist of letters written by the party to be charged to his own agent, or to other third persons.<sup>79</sup> A letter, for instance, to a mother, proposing to marry her daughter, shown to the latter, and stating that the writer intended to convey certain land to the latter when they should be married, was held a sufficient memorandum of the agreement to convey.<sup>80</sup> The memorandum may even consist of entries made by the party to be charged on his or his agent's books;<sup>81</sup> and entries in the records of a corporation may prove a contract by it.<sup>82</sup> So, also, resolutions of a city council may be a sufficient memorandum of a contract by it on behalf of

<sup>77</sup> *Lerned v. Wanemacher*, 9 Allen (Mass.) 412; *Gale v. Nixon*, 6 Cow. (N. Y.) 445; *Sheehy v. Fulton* (Neb.) 57 N. W. Rep. 395. But not after the action is commenced. *Bill v. Bament*, 9 Mees. & W. 36; *Lucas v. Dixon*, 22 Q. B. Div. 357; *Bird v. Munroe*, 66 Me. 337. But see post, p. 117, note 87. It has been held in Illinois that a verbal agreement in consideration of marriage is not taken out of the statute by being reduced to writing after marriage. *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. Rep. 397.

<sup>78</sup> *Atwood v. Cobb*, 16 Pick. (Mass.) 230.

<sup>79</sup> *Gibson v. Holland*, L. R. 1 C. P. 1; *Peabody v. Speyers*, 56 N. Y. 230; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. Rep. 536; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. Rep. 835; *Cunningham v. Williams*, 43 Mo. App. 629; *Spangler v. Stanforth*, 65 Ill. 152; *Moss v. Atkinson*, 44 Cal. 3.

<sup>80</sup> *North Platte M. & E. Co. v. Price* (Wyo.) 33 Pac. Rep. 664.

<sup>81</sup> *Johnson v. Dodgson*, 2 Mees. & W. 653; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Coddington v. Goddard*, 16 Gray (Mass.) 436.

<sup>82</sup> *Tufts v. Plymouth, etc., Co.*, 14 Allen (Mass.) 407.

the city.<sup>82</sup> A telegram may be a sufficient memorandum to satisfy the statute and charge the party by whom it is sent.<sup>84</sup> Even recitals in a will have been held sufficient evidence of a contract by the testator to answer for the debts of his son.<sup>85</sup>

A letter repudiating a verbal contract previously made by the writer may be sufficient evidence of such contract to render it enforceable against him.<sup>86</sup> Some of the courts seem to hold that the admission of a verbal contract in the pleadings in an action is a sufficient memorandum, but the decisions are no doubt based on the fact that the statute, not having been pleaded, is waived.<sup>87</sup> However this may be, the contrary is the rule.<sup>88</sup>

*Showing as to Agreement.*

The memorandum must show agreement on the part of the party sought to be charged; that is, it must show a concluded contract in so far as he is concerned.<sup>89</sup> In most jurisdictions, where a written proposal has been made by the party sought to be charged, an acceptance by the other party may be established by parol evidence.<sup>90</sup>

<sup>82</sup> *Marden v. Champlin*, 17 R. I. 423, 22 Atl. Rep. 938; *Argus Co. v. City of Albany*, 55 N. Y. 495. But see *Wilhelm v. Fagan*, 90 Mich. 6, 50 N. W. Rep. 1072.

<sup>83</sup> *Trevor v. Wood*, 38 N. Y. 307; *Marschall v. Eisen Vineyard Co.*, 21 N. Y. Supp. 468; *McElroy v. Buck*, 35 Mich. 434; *Little v. Dougherty*, 11 Colo. 103, 17 Pac. Rep. 292; *Everman v. Herndon (Miss.)* 11 South. Rep. 652; *Whaley v. Hinchman*, 22 Mo. App. 483.

<sup>84</sup> *In re Hoyle*, 41 Wkly. Rep. 81.

<sup>85</sup> *Louisville Asphalt, Varnish Co. v. Lorick*, 29 S. C. 533, 8 S. E. Rep. 8.

<sup>86</sup> *Gregg v. Garrett (Mont.)* 31 Pac. Rep. 721; *Lauer v. Richmond Co-operative Mercantile Inst.*, 8 Utah, 305, 31 Pac. Rep. 397. See ante, p. 116, note 77; post, p. 135, notes 149, 150.

<sup>87</sup> *Taylor v. Allen*, 40 Minn. 433, 42 N. W. Rep. 292; *Holler v. Richards*, 102 N. C. 545, 9 S. E. Rep. 460; *Barrett v. McAllister*, 33 W. Va. 738, 19 S. E. Rep. 220; *Browning v. Berry*, 107 N. C. 231, 12 S. E. Rep. 195.

<sup>88</sup> *Coe v. Tough*, 116 N. Y. 273, 22 N. E. Rep. 550.

<sup>89</sup> *Beuss v. Picksley*, L. R. 1 Exch. 342; *Farwell v. Lowther*, 18 Ill. 252; *Gradle v. Warner (Ill. Sup.)* 29 N. E. Rep. 1118; *Ehrmantraut v. Robinson (Minn.)* 54 N. W. Rep. 188; *Himrod Furnace Co. v. Cleveland & M. R. Co.*, 22 Ohio St. 451.



*Showing as to the Parties.*

The memorandum of the contract must show who are the parties to it; not only who is the promisor, but who is the promisee as well. Thus, where a person promised that he would answer for the debt of a third person, and signed a memorandum to that effect, but the memorandum did not show the name of the promisee, it was held insufficient to satisfy the requirements of the statute. "No document," it was said, "can be an agreement or memorandum of one, which does not show on its face who the parties making the agreement are."<sup>1</sup>

Most courts hold that a party need not necessarily be named, if he is sufficiently described in the memorandum; and that the description will let in parol evidence to show his identity, though it would be inadmissible in the absence of the description.<sup>2</sup> It has been held, for instance, that where a person in his own name enters into a contract as the agent of another, the other party

<sup>1</sup> *Williams v. Lake*, 2 El. & El. 349. And see *McConnell v. Brillhart*, 17 Ill. 354; *McElroy v. Seery*, 61 Md. 389; *Sherburne v. Shaw*, 1 N. H. 157; *Grafton v. Cummings*, 99 U. S. 100; *McGovern v. Hern*, 153 Mass. 238, 26 N. E. Rep. 861; *Lewis v. Wood*, 153 Mass. 321, 26 N. E. Rep. 862; *Coombs v. Wilkes* [1891] 3 Ch. 77; *Watt v. Wisconsin Cranberry Co.*, 63 Iowa, 730, 18 N. W. Rep. 373. A memorandum of a sale of goods, which does not clearly show which party is vendor and which vendee, is not sufficient. *Frank v. Eltringham*, 65 Miss. 281, 3 South. Rep. 655; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399. But see *Thornton v. Kelly*, 11 R. I. 498. An auctioneer's memorandum of a sale of land must show who the vendor is. *O'Sullivan v. Overton*, 56 Conn. 102, 14 Atl. Rep. 300; *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. Rep. 1044.

<sup>2</sup> *Sale v. Lambert*, 18 Eq. 1; *Fessenden v. Mussey*, 11 Cush. (Mass.) 127; *Lerned v. Johns*, 9 Allen (Mass.) 419; *Catling v. King*, 5 Ch. Div. 660; *Thornton v. Kelly*, 11 R. I. 498; *Violett v. Powell*, 10 B. Mon. (Ky.) 347; *Dykens v. Townsend*, 24 N. Y. 57; *Jones v. Dow*, 142 Mass. 130, 7 N. E. Rep. 839. Parol evidence is admissible to apply initials signed to the memorandum. *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Salmon Falls Manuf'g Co. v. Goddard*, 14 How. 447; *Palmer v. Stephens*, 1 Denio (N. Y.) 471. Where a defendant had directed his factor to sell goods, and to use a fictitious name to represent him as seller, and the fictitious name was inserted in the factor's memorandum, parol evidence was held admissible to show that the name represented defendant. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. Rep. 950. But see *Minard v. Mead*, 7 Wend. (N. Y.) 68; *Newcomb v. Clark*, 1 Denio (N. Y.) 228.

to the contract may show by parol evidence that he really contracted with the principal who has been described in the memorandum in the character of the agent.<sup>83</sup>

*Showing as to Terms.*

The memorandum must show the terms, and all the terms, of the agreement. Where a contract does not fall within the statute, the parties may, at their option, put their agreement in writing, or they may contract orally, or they may put some of the terms in writing, and arrange others orally. In the latter case, although that which is written cannot be varied by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract. Where, however, a contract falls within the statute, all its terms must be in writing.<sup>84</sup> Parol evidence of terms not appear-

<sup>83</sup> *Trueman v. Loder*, 11 Adol. & El. 589; *Dykers v. Townsend*, 24 N. Y. 57; *Lerned v. Johns*, 9 Allen (Mass.) 419; *Sanborn v. Flagler*, 9 Allen (Mass.) 477; *Williams v. Bacon*, 2 Gray (Mass.) 387; *Hargrove v. Adcock*, 111 N. C. 168, 16 S. E. Rep. 16; *McConnell v. Brillhart*, 17 Ill. 354; *Violet v. Powell*, 10 B. Mon. (Ky.) 347; *Hypes v. Griffin*, 89 Ill. 134; *Tewsbury v. Howard* (Ind.) 37 N. E. Rep. 355; *Mantz v. Maguire*, 52 Mo. App. 136. Contra, *Clampet v. Bella*, 39 Minn. 272, 39 N. W. Rep. 495; *Repetti v. Maisak*, 6 Mackey, 306. The agent, however, after making the contract in his own name, cannot show by parol that he is not the real party to the contract. *Higgins v. Senior*, 8 Mees. & W. 834; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

<sup>84</sup> *Farwell v. Mather*, 10 Allen (Mass.) 322; *May v. Ward*, 134 Mass. 127; *Drake v. Seaman*, 97 N. Y. 230; *Wright v. Weeks*, 25 N. Y. 153; *Fowler v. Redican*, 2 Ill. 405; *Williams v. Woods*, 16 Md. 220; *Sheley v. Whitman*, 67 Mich. 397, 34 N. W. Rep. 879; *Messmore v. Cunningham*, 78 Mich. 623, 44 N. W. Rep. 145; *Lester v. Heidt*, 86 Ga. 226, 12 S. E. Rep. 214; *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. Rep. 800; *Lazear v. National Union Bank*, 32 Md. 78; *Fry v. Platt*, 32 Kan. 62, 3 Pac. Rep. 781; *Willy v. Robert*, 27 Mo. 388; *Frank v. Miller*, 38 Md. 450; *O'Donnell v. Leeman*, 43 Me. 158; *Kriete v. Myer*, 61 Md. 558. A memorandum of a contract to sell land, which does not mention the purchase price nor the times of payment, is insufficient. *Webster v. Brown*, 67 Mich. 328, 34 N. W. Rep. 676; *Gault v. Stormount*, 51 Mich. 636, 17 N. W. Rep. 214; *Grafton v. Cummings*, 99 U. S. 100. But see *Ellis v. Bray*, 79 Mo. 227. So, also, with a memorandum of a sale of goods omitting terms of payment. *Elliot v. Barrett*, 144 Mass. 256, 10 N. E. Rep. 820. A memorandum setting out the terms of payment under a contract of sale as "one-third cash, and notes to be executed for the balance," is not sufficient, as there is nothing to show the number of notes to be given, interest thereon, or date of payment. *Nelson v. Shelby Manuf'g & Imp. Co.* (Ala.)

ing in the writing would not only not be enforced, but would invalidate the contract by showing that it was something different from what appears in the memorandum.

It is said in a Massachusetts case that: "The contract or memorandum must express the substance of the contract with reasonable certainty, either by its own terms or by reference to some other deed, record, or other matter from which it can be ascertained with like reasonable certainty. The statute is intended as a shield. No particular forms are required, and it looks at the substance of the contract. It requires a note or memorandum of the contract, not a detail of all its particulars."<sup>85</sup> While this is no doubt sound law, it must not be taken to mean that any of the terms of the contract can be shown by parol evidence. They must be in some way expressed in writing.

*Showing as to Subject-Matter.*

The writing must also show the subject-matter, at least to such an extent that it can be identified.<sup>86</sup> Parol evidence is admitted to identify the subject-matter to which the writing refers; as, for instance, to identify a house described in the writing as a "house on Church street," or property described as "your half, E. B. wharf, and premises this day agreed upon between us."<sup>87</sup>

11 South. Rep. 695. In a memorandum of a contract for the sale of lands or goods the price must be stated. *Phelps v. Stillings*, 60 N. H. 505; *Watt v. Wisconsin Cranberry Co.*, 63 Iowa, 730, 18 N. W. Rep. 898; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Phillips v. Adams*, 70 Ala. 373; *Ide v. Stanton*, 15 Vt. 686. But failure to state the price, where an adequate price was in fact paid, was held not to render the memorandum insufficient. *Sayward v. Gardner*, 5 Wash. St. 247, 31 Pac. Rep. 761.

<sup>85</sup> *Atwood v. Cobb*, 16 Pick. (Mass.) 230. And see *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. Rep. 41; *Frazer v. Howe*, 106 Ill. 563; *Farwell v. Mather*, 10 Allen (Mass.) 322; *Gordon v. Avery*, 102 N. C. 532, 9 S. E. Rep. 486.

<sup>86</sup> *Whelan v. Sullivan*, 102 Mass. 204; *Beckman v. Fletcher*, 48 Mich. 555, 12 N. W. Rep. 849; *Pierson v. Ballard*, 32 Minn. 263, 20 N. W. Rep. 193; *Tice v. Freeman*, 30 Minn. 389, 15 N. W. Rep. 674; *King v. Wood*, 7 Mo. 389.

<sup>87</sup> *Mead v. Parker*, 115 Mass. 413; *Tallman v. Franklin*, 14 N. Y. 584; *Ryan v. United States*, 136 U. S. 68, 10 Sup. Ct. Rep. 913; *Mellon v. Davison*, 123 Pa. St. 298, 16 Atl. Rep. 431; *Barry v. Coombe*, 1 Pet. 640; *Henderson v. Perkins* (Ky.) 21 S. W. Rep. 1035; *Dougherty v. Chesnutt*, 86 Tenn. 1, 5 S. W. Rep. 444; *Lente v. Clarke*, 22 Fla. 515, 1 South. Rep. 149; *Cossitt v. Hobbs*, 56 Ill. 231; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. Rep. 536; *Morrison v.*

*Showing as to Consideration.*

Not only must a consideration for the promise sought to be enforced exist, but it must, according to the rulings in England, and probably in most of the states, expressly or impliedly appear in the memorandum. As stated by Lord Ellenborough in the leading case on this point, the reason for the rule is because the word "agreement," used in the statute, "is not satisfied unless there be a consideration, which consideration, forming part of the agreement, ought, therefore, to have been shown; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing."<sup>88</sup> Other courts

Dalley (Tex. Sup.) 6 S. W. Rep. 426; Quinn v. Champagne, 38 Minn. 322, 37 N. W. Rep. 451; Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. Rep. 179; Humbert v. Brisbane, 25 S. C. 506; Oliver v. Hunting, 44 Ch. Div. 205. A memorandum of a sale of real estate is not sufficient where it merely describes it as "an estate on A. street, owned by B.," and the evidence shows that B. owned two estates on that street. Doherty v. Hill, 144 Mass. 465, 11 N. E. Rep. 581. And see Jones v. Tye (Ky.) 20 S. W. Rep. 388. Reference to land as "your land," in a letter to the alleged vendor is not sufficient. Taylor v. Allen, 40 Minn. 433, 42 N. W. Rep. 292. And see Lowe v. Harris, 112 N. C. 472, 17 S. E. Rep. 539. A memorandum that P. shall have the land "of which he is now in possession" has been held sufficient, parol evidence being admissible to identify it. Phillips v. Swank, 120 Pa. St. 76, 13 Atl. Rep. 712. And see Falls of Neuse Manuf'g Co. v. Hendricks, 106 N. C. 485, 11 S. E. Rep. 568. Where land agreed to be sold was referred to in the first correspondence as the "Schoolcraft store," and in the subsequent correspondence as the "Property," the description was held sufficient. Francis v. Barry, 69 Mich. 311, 37 N. W. Rep. 353. An agreement for the sale of a designated number of acres "in" a specified larger tract of land, the subject of the agreement not being otherwise designated, is not sufficient. Brockway v. Frost, 40 Minn. 155, 41 N. W. Rep. 411. And see Repetti v. Malsak, 6 Mackey, 366.

<sup>88</sup>Wain v. Warlters, 5 East. 10. And see Sears v. Brink, 3 Johns. (N. Y.) 210; Taylor v. Pratt, 3 Wis. 674; Thompson v. Blanchard, 3 N. Y. 335; Orde-man v. Lawson, 49 Md. 135; Wyman v. Gray, 7 Har. & J. (Md.) 409; Sloan v. Wilson, 4 Har. & J. (Md.) 822; Deutsch v. Bond, 46 Md. 164; Marston v. French (Com. Pl. N. Y.) 17 N. Y. Supp. 509; Buckley v. Beardsley, 5 N. J. Law, 572; Gregory v. Logan, 7 Blackf. (Ind.) 112; Ellison v. Jackson Water Co., 12 Cal. 542; Hargroves v. Cooke, 15 Ga. 321. It is sufficient if the consideration can be gathered from the entire contract. The words "value received" have been held enough. Watson v. McLaren, 19 Wend. (N. Y.) 557; Osborne v. Baker, 34 Minn. 307, 25 N. W. Rep. 606; Edelin v. Gough, 5 Gilf

have refused to recognize this doctrine, though in some of these cases the statute used the word "promise" instead of "agreement."<sup>99</sup> Most of the states, however, have put this question at rest by statutory provisions expressly declaring it necessary<sup>100</sup> or unnecessary<sup>101</sup> to express the consideration in the writing. Even where the statute provides that the consideration need not be expressed, it must be expressed if it is executory, and modifies the promise; for in such case it is a term of the contract.<sup>102</sup>

### *Separate Papers.*

Though, as we have seen, the agreement and all its terms, the parties, and, in some jurisdictions, the consideration, must be expressed in writing, it need not be in one document. The memorandum may consist in any number of letters, telegrams, or other pieces of paper.<sup>103</sup> The papers, however, must be connected, consistent, and complete.

(Md.) 103; *Emerson v. C. Aultman & Co.*, 69 Md. 125, 14 Atl. Rep. 671; *Smith v. Northrup* (Sup.) 29 N. Y. Supp. 851. The presence of a seal has been held a sufficient recital of the consideration. *Johnston v. Wadsworth* (Or.) 34 Pac. Rep. 13; *Smith v. Northrup*, *supra*.

<sup>99</sup> *Packard v. Richardson*, 17 Mass. 122; *Brittain v. Aingier*, 48 N. H. 422 (overruling *Underwood v. Campbell*, 14 N. H. 393); *Gillighan v. Boardman*, 29 Me. 79; *Patchin v. Swift*, 21 Vt. 292; *Shively v. Black*, 45 Pa. St. 345; *Sage v. Wilcox*, 6 Conn. 81; *Violett v. Patton*, 5 Cranch, 151 (construing the Virginia statute); *Reed v. Evans*, 17 Ohio, 128; *Steadman v. Guthrie*, 4 Metc. (Ky.) 147; *Taylor v. Ross*, 3 Yerg. (Tenn.) 330; *Adkins v. Watson*, 12 Tex. 199; *Halsa v. Halsa*, 8 Mo. 303; *How v. Kemball*, 2 McLean, 103, Fed. Cas. No. 6,748.

<sup>100</sup> It is declared necessary in Alabama, Minnesota, Nevada, and Oregon. A guaranty of a note, written by a third person on the note before delivery, need express no consideration, since the guaranty requires no other consideration than that which the note on its face implies to have passed between the original parties; but it is otherwise if the guaranty is written after the note has been delivered and taken effect as a contract. *Moses v. National Bank*, 149 U. S. 298, 13 Sup. Ct. Rep. 900 (under Alabama statute).

<sup>101</sup> It is declared unnecessary in Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey, and Virginia. See *Hayes v. Jackson* (Mass.) 34 N. E. Rep. 683.

<sup>102</sup> See *Drake v. Seaman*, 97 N. Y. 230.

<sup>103</sup> *Reuss v. Picksley*, L. R. 1 Exch. 342; *Ryan v. United States*, 136 U. S. 83, 10 Sup. Ct. Rep. 913; *Peabody v. Speyers*, 56 N. Y. 230; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. Rep. 536; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. Rep. 41; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. Rep. 835; *Oliver v. Alabama*

It is generally held that the connection between various papers must be made out from the papers themselves, and that it cannot be shown by parol evidence.<sup>104</sup> But, if one paper is referred to in another, it may be identified by parol evidence.<sup>105</sup>

To say that the papers must be consistent is merely to reiterate what was said in treating of offer and acceptance. As we explained in that connection, doubt and difference is incompatible with contract.

Again, the terms must be complete in the writing. This point we have already explained in so far as regards the necessity to show the parties, the terms, the subject-matter, and the consideration. It is almost needless to repeat that the papers must show a

Gold Life Ins. Co., 82 Ala. 417, 2 South. Rep. 445; *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. Rep. 345; *Gulf, C. & S. F. Ry. Co. v. Settegast*, 79 Tex. 256, 15 S. W. Rep. 228; *Bayne v. Wiggins*, 139 U. S. 210, 11 Sup. Ct. Rep. 521; *Olson v. Sharpless* (Minn.) 55 N. W. Rep. 125.

Where, for instance, a person issued a prospectus of illustrations of Shakspeare, to be published on terms of subscription therein set out, and A. entered his name in a book entitled "Shakspeare Subscribers. Their Signatures," in the publisher's shop, and afterwards refused to subscribe, it was held that there was no sufficient documentary evidence to connect the subscription book with the prospectus, so as to make a sufficient memorandum of the contract, and that the deficiency could not be made good by parol evidence. *Boydell v. Drummond*, 11 East, 142. And see *Peirce v. Corf*, L. R. 9 Q. B. 210; *Taylor v. Smith*, 61 Law J. Q. B. 331; *Kronhelm v. Johnson*, 7 Ch. Div. 60; *Morton v. Dean*, 13 Metc. (Mass.) 385; *O'Donnell v. Leeman*, 43 Me. 158; *Tallman v. Franklin*, 14 N. Y. 584; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. Rep. 41; *Doughty v. Manhattan Brass Co.*, 101 N. Y. 644, 4 N. E. Rep. 747; *Adams v. M'Millan*, 7 Port. (Ala.) 73; *North v. Mendel*, 73 Ga. 400; *Oliver v. Alabama Gold Life Ins. Co.*, 82 Ala. 417, 2 South. Rep. 445; *Orne v. Cook*, 31 Ill. 238; *Duff v. Hopkins*, 33 Fed. Rep. 509; *Boeckeler v. McGowan*, 12 Mo. App. 50; *Coombs v. Wilkes* [1891] 3 Ch. 77; *Andrew v. Babcock* (Conn.) 26 Atl. Rep. 715; *Morton v. Dean*, 13 Metc. (Mass.) 385. A contract for the sale of land, containing no description of it, was held insufficient, though there was a description of land on the back of the paper, there being no words to connect the indorsement with the contract. *Wilstach v. Heyd*, 122 Ind. 574, 23 N. E. Rep. 963. Reciprocal wills not referring to each other. *Hale v. Hale* (Va.) 19 S. E. Rep. 739.

*Long v. Miller*, 4 C. P. Div. 450; *Oliver v. Alabama Gold Life Ins. Co.*, 82 Ala. 417, 2 South. Rep. 445; *Beckwith v. Talbot*, 95 U. S. 289; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. Rep. 41; *Thayer v. Luce*, 22 Ohio St. 62; *Work v. Cowhick*, 81 Ill. 317.

completely concluded contract in so far as the party to be charged is concerned.<sup>106</sup>

*Signature.*

The statute requires that the memorandum must be signed by "the party to be charged," or some other person by him lawfully authorized, and this is essential.<sup>107</sup> As to whether it must have been signed by the party seeking to enforce it, there is much conflict in the decisions. Probably all courts hold that it need not be so signed if the consideration given by the party suing is executed; that is, if he has fully performed his part of the contract. The conflict is where there are mutual promises. Some courts hold in these cases that the contract, not being enforceable against the party who has not signed it, is void for want of mutuality.<sup>108</sup> Other courts hold that want of mutuality is no objection, and that the requirements of the statute are satisfied if the memorandum is signed by the party against whom it is sought to be enforced; in other words, that the contract need not be enforceable at the suit of both parties, but it may be optional with the party who has not signed to enforce it against the party who has.<sup>109</sup>

<sup>106</sup> *Coe v. Tough*, 116 N. Y. 273, 22 N. E. Rep. 550. And see ante, p. 117.

<sup>107</sup> *Sanborn v. Sanborn*, 7 Gray (Mass.) 142; *Cloud v. Greasley* (Ill. Sup.) 17 N. E. Rep. 826; *Rafferty v. Lougee*, 63 N. H. 54; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399; *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. Rep. 164, and 30 Pac. Rep. 459; *McElroy v. Seery*, 61 Md. 389; *Moore v. Powell* (Tex. Civ. App.) 25 S. W. Rep. 472. In Nebraska it has lately been held that, since, prior to the statute of frauds, a parol contract for the sale of land, with delivery of possession, was valid, and since the statute has merely changed the common law so that the party to be charged—ordinarily the vendor—need sign the memorandum, the vendee accepting the same is bound as at common law. *Gardels v. Kloeke* (Neb.) 54 N. W. Rep. 834. This, however, is very doubtful.

<sup>108</sup> *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. Rep. 139; *Corbitt v. Salem Gaslight Co.*, 6 Or. 405; *Krohn v. Bantz*, 68 Ind. 277; *Thomas v. Trustees*, 3 A. K. Marsh. (Ky.) 298; *Stiles v. McClellan*, 6 Colo. 89.

<sup>109</sup> *Justice v. Lang*, 42 N. Y. 493; *Reuss v. Picksley*, L. R. 1 Exch. 342; *Clason v. Bailey*, 14 Johns. (N. Y.) 487; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Penniman v. Hartshorn*, 13 Mass. 87; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25; *Love v. Welch*, 97 N. C. 200, 2 S. E. Rep. 242; *Williams v. Robinson*, 73 Me. 186; *Pettibone v. Moore*, 27 N. Y. Supp. 455; *Morin v. Martz*, 13 Minn. 191 (Gil. 180); *Oliver v. Alabama, etc., Ins. Co.*, 82 Ala. 417, 2 South. Rep.

Where the statute, following the English statute, uses the word "signed," the signature need not be an actual subscription of the party's name, but may be a mark;<sup>110</sup> or it may be his initials, in which case parol evidence is admissible to identify him;<sup>111</sup> or it may be printed, stamped, or engraved.<sup>112</sup> Nor, where the statute is so worded, need the signature be placed at the end of the document as a formal signature. If the name of the party to be charged appear in the memorandum, so as to be applicable to the whole substance of the writing, and was written by himself, or by his authorized agent, it is immaterial where the name appears, whether at the top or at the bottom, or whether it is merely mentioned in the body of the memorandum.<sup>113</sup> Where, however, the

445; *J. I. Case T. M. Co. v. Smith* (Or.) 18 Pac. Rep. 641; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Douglass v. Spears*, 2 Nott & McC. (S. C.) 207; *Smith's Appeal*, 69 Pa. St. 481; *Anderson v. Harrold*, 10 Ohio, 399; *Ives v. Hazard*, 4 R. I. 81; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. Rep. 979; *Perkins v. Hadsell*, 50 Ill. 217; *Gartrell v. Stafford*, 12 Neb. 545, 11 N. W. Rep. 732; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. Rep. 515; *Cunningham v. Williams*, 43 Mo. App. 629; *Scott v. Glenn* (Cal.) 32 Pac. Rep. 983; *Jones v. Davis*, 48 N. J. Eq. 493, 21 Atl. Rep. 1035.

<sup>110</sup> *Baker v. Dening*, 8 Adol. & E. 94; *Zacharie v. Franklin*, 12 Pet. 151; *Brown v. Butchers' & D. Bank*, 6 Hill (N. Y.) 443. A mark by the promisor, whose name has been written by the promisee, is not sufficient. *Carlisle v. Campbell*, 76 Ala. 247. And see *Dewey v. Young*, 58 Md. 546. See post, p. 118.

<sup>111</sup> *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Salmon Falls Manuf'g Co. v. Goddard*, 14 How. 447; *Palmer v. Stephens*, 1 Denio (N. Y.) 471.

<sup>112</sup> *Bennett v. Brumfitt*, L. R. 3 C. P. 30; *Drury v. Young*, 58 Md. 546; *Schneider v. Norris*, 2 Maule & S. 286; *Weston v. Myers*, 33 Ill. 424.

<sup>113</sup> *Davis v. Shields*, 26 Wend. (N. Y.) 341, at page 353. As said in a case in which his agent wrote the name of the party sought to be charged in the body of the contract: "It is sufficient if the names of the principals are inserted in such form and manner as to indicate that it is their contract. \* \* \* It is the substance, and not the form, of the memorandum, which the law regards. The great purpose of the statute is answered if the names of the parties and the terms of the contract of sale are authenticated by written evidence, and do not rest in parol proof." *Coddington v. Goddard*, 16 Gray (Mass.) 444. And see *Caton v. Caton*, L. R. 2 H. L. 127; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Wise v. Ray*, 3 Greene (Iowa) 430; *Boardman v. Spooner*, 13 Allen (Mass.) 358; *Penniman v. Hartshorn*, 13 Mass. 87; *Evans v. Hoare* [1892] 1 Q. B. 593; *Braley v. Kelly*, 25 Minn. 160; *Tingley v. Beltingham Bay Boom Co.*, 5 Wash. St. 644, 32 Pac. Rep. 737.



statute, instead of using the word "signed," requires the memorandum to be "subscribed," it has been held in New York that there must be a formal signature at the bottom of the memorandum.<sup>114</sup>

A party to a contract may sign a rough draft of its terms, and acknowledge his signature when the draft has been corrected, and the contract is actually concluded.<sup>115</sup>

### *Signature by Agent.*

The memorandum may be signed by the duly-authorized agent of the party to be charged.<sup>116</sup> The agent must not be the other contracting party, but some third person, for to allow otherwise would be to open the door for the fraud which the statute was intended to prevent.<sup>117</sup>

In cases of sales at auction, the auctioneer, acting only as such, is the competent agent of both parties, and his memorandum is binding on both. He is the agent of the vendor by virtue of his employment, and he is made the agent of the vendee by the act of the latter in giving him his bid, and receiving the announcement that the property is knocked off to him as purchaser.<sup>118</sup> This,

<sup>114</sup> *Davis v. Shields*, 26 Wend. (N. Y.) 341. And see *James v. Patten*, 6 N. Y. 9; *Champlin v. Parrish*, 11 Paige (N. Y.) 405.

<sup>115</sup> *Stewart v. Eddowes*, L. R. 9 C. P. 314.

<sup>116</sup> *Heffron v. Armsby*, 61 Mich. 505, 28 N. W. Rep. 672; *Tynan v. Dullnig* (Tex. Civ. App.) 25 S. W. Rep. 465. Signature by broker as agent is sufficient. *Williams v. Woods*, 16 Md. 220. As to what constitutes sufficient "signing" by agent, see ante, pp. 118, 125. A memorandum: "Received of S. \* \* \* for \* \* \* [certain land], which I have this day, as authorized agent, sold to said S.," signed "C., by B., Agent," indicates that C. is the agent mentioned, and that B. describes himself as authorized to sign C.'s name, and not that C. is the principal. *Morton v. Stone*, 39 Minn. 275, 39 N. W. Rep. 496.

<sup>117</sup> *Bent v. Cobb*, 9 Gray (Mass.) 397. And see *Sherman v. Brandt*, L. R. 6 Q. B. 720; *Farebrother v. Simmons*, 5 Barn. & Ald. 333; *Carlisle v. Campbell*, 76 Ala. 247; *Dewey v. Young*, 58 Md. 546.

<sup>118</sup> *Bent v. Cobb*, 9 Gray (Mass.) 397; *First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Mentz v. Newwitter* (Com. Pl. N. Y.) 1 N. Y. Supp. 73, (but see 122 N. Y. 491, 25 N. E. Rep. 1044); *Morton v. Dean*, 13 Metc. (Mass.) 385; *McBayer v. Cohen* (Ky.) 18 S. W. Rep. 123; *Meadows v. Meadows*, 3 McCord (S. C.) 458; *Singstack v. Harding*, 4 Har. & J. (Md.) 186; *Gill v. Bicknell*,

however, does not apply where the vendor is himself the auctioneer.<sup>119</sup> The memorandum must be made at the time of the sale.<sup>120</sup>

As we have already seen, if the agent signs his own name, the other party to the contract may show by parol that he really contracted with the principal.<sup>121</sup> The agent, however, after making the contract in his own name, cannot show by parol that he is not the real party to the contract.<sup>122</sup> If the agent exceeds his authority, his signature does not bind the principal.<sup>123</sup>

Unless the statute expressly so requires, the authority of the agent need not be in writing.<sup>124</sup> In some states, however, the statute does so require in the case of contracts relating to land.<sup>125</sup>

#### *Delivery.*

The memorandum, being required merely as evidence of the contract, and not constituting the contract itself, as is the case with a deed, need not be delivered by the party to be charged.<sup>126</sup> Nondelivery is only material in so far as it may tend to show that no final agreement has been reached. It is held, however, that a deed of land must be delivered to constitute a sufficient memorandum of

2 Cush. (Mass.) 355. Where the auctioneer leaves before making a sale, and the owner of the property sells to one who has bid on it, the clerk of the sale is not the agent of the bidder, so that he can bind him by a memorandum. Wyckoff v. Mickle (N. J. Ch.) 20 Atl. Rep. 214.

<sup>119</sup> Bent v. Cobb, 9 Gray (Mass.) 397.

<sup>120</sup> Gill v. Bicknell, 2 Cush. (Mass.) 355; Horton v. McCarty, 53 Me. 394.

<sup>121</sup> Ante, p. 118.

<sup>122</sup> Higgins v. Senior, 8 Mees. & W. 834; Waring v. Mason, 18 Wend. (N. Y.) 425.

<sup>123</sup> Henderson v. Beard, 51 Ark. 483, 11 S. W. Rep. 766.

<sup>124</sup> Koehl v. Haumesser, 114 Ind. 311, 15 N. E. Rep. 345; Kennedy v. Ehlen, 31 W. Va. 540, 8 S. E. Rep. 398; Watson v. Sherman, 84 Ill., at page 267. But see Simpson v. Com., 89 Ky. 412, 12 S. W. Rep. 630; post, p. 715.

<sup>125</sup> Hall v. Wallace, 88 Cal. 434, 26 Pac. Rep. 360; Gerhart v. Peck, 42 Mo. App. 644; Castner v. Richardson (Colo. Sup.) 33 Pac. Rep. 163; Kozel v. Dearlove, 144 Ill. 23, 32 N. E. Rep. 542; Lasher v. Gardner, 124 Ill. 441, 16 N. E. Rep. 919; Chappell v. McKnight, 108 Ill. 570. See Kneedler v. Anderson, 43 Ill. App. 317. Agreement employing a broker to purchase or sell land,—requisites under California statute. Toomey v. Dunphy, 86 Cal. 639, 25 Pac. Rep. 130.

<sup>126</sup> Drury v. Young, 58 Md. 546.

the contract to sell.<sup>127</sup> A delivery of the deed in escrow is sufficient.<sup>128</sup>

#### **SAME—EFFECT OF NONCOMPLIANCE WITH SECTION 4.**

51. The fourth section of the statute provides that “no action shall be brought” whereby to charge a person on verbal contracts within its provisions.

52. This does not render a verbal contract void, but merely excludes parol proof, and renders it unenforceable by suit.

53. In some states the statute declares that the contract “shall be void.”

Having discussed the form required by the fourth section of the statute of frauds, and the contracts to which it applies, it only remains to consider the position of the parties who have entered into such contracts, but have failed to comply with the statute. The English statute, which has been followed by the statutes of most of the states, does not declare that the contracts, if entered into orally, shall be void, but simply that “no action shall be brought” on them. Construing these words, it is held that the statute does not go to the existence of the contract, but merely makes written evidence necessary to establish it. The contract is not void, but simply unenforceable by suit.<sup>129</sup> The parties may

<sup>127</sup> *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. Rep. 22; *Callanan v. Chapin* (Mass.) 32 N. E. Rep. 941; *Swain v. Burnette*, 89 Cal. 564, 26 Pac. Rep. 1093; *Day v. Lacasse*, 85 Me. 242, 27 Atl. Rep. 124. And see *Kopp v. Reiter* (Ill. Sup.) 34 N. E. Rep. 942. But see *Johnston v. Jones*, 85 Ala. 286, 4 South. Rep. 748.

<sup>128</sup> *Johnston v. Jones*, 85 Ala. 286, 4 South. Rep. 748; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. Rep. 315; *Lewis v. Prather* (Ky.) 21 S. W. Rep. 538. But see *Ducett v. Wolf*, 81 Mich. 311, 45 N. W. Rep. 820.

<sup>129</sup> *Leroux v. Brown*, 12 C. B. 801; *Townsend v. Hargraves*, 118 Mass. 325; *Montague v. Garnett*, 3 Bush (Ky.) 207; *Baker v. Lauterbach*, 68 Md. 64, 11 Atl. Rep. 703; *Crane v. Gough*, 4 Md. 316; *Newton v. Bronson*, 13 N. Y. 587; *Gale v. Nixon*, 6 Cow. (N. Y.) 445; *Brakefield v. Anderson*, 3 Pickle (Tenn.) 206, 10 S. W. Rep. 360; *Browning v. Parker*, 17 R. I. 183, 20 Atl. Rep. 835; *Webster v. Le Compte*, 74 Md. 249, 22 Atl. Rep. 232; *Ohio & M. R. Co. v. Trapp* (Ind. Sup.) 30 N. E. Rep. 812; *Montgomery v. Edwards*, 46 Vt. 151; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Whitney v. Cochran*, 1 Scam. (Ill.)

perform it if they choose, but they cannot be compelled to do so, for no contract can be shown.

Though the contract cannot, for this reason, be sued upon successfully, yet it is available for some purposes. If it has been fully performed, the courts will recognize and protect the rights of the parties acquired under it. And if it has been performed by one of the parties by payment of the consideration he will not be allowed to recover back what he has paid, where the other party is willing to perform on his part.<sup>120</sup>

In some states the statute does not follow the language of the English statute, but declares that the contract "shall be void" unless in writing.<sup>121</sup> In these states it would seem that the statute must go to the existence of the contract, and render it absolutely void. In a Massachusetts case, however, in construing the section of the statute of that state relating to contracts for the sale of goods, which declared that no such contract should be held to be good and "valid," it was held that it was not the intention of the legislature to declare such contracts void, but simply to prevent oral proof.<sup>122</sup>

Further illustration of the rule that a contract which does not comply with the statute is not void, but simply unenforceable, is found in the mode in which courts of equity deal with such contracts, to be presently explained.

210; *La Du-King Manuf'g Co. v. La Du*, 36 Minn. 443, 31 N. W. Rep. 938; *Bird v. Munroe*, 66 Me. 337. The courts often use the word "void" carelessly, and the fact that they speak of a contract as void cannot always be relied on.

<sup>120</sup> *Galway v. Shields*, 68 Mo. 313; *Coughlin v. Knowles*, 7 Metc. (Mass.) 57; *Sims v. Hutchins*, 8 Smedes & M. (Miss.) 331; *Shaw v. Shaw*, 6 Vt. 69; *Hawley v. Moody*, 24 Vt. 605. And see *Lane v. Shackford*, 5 N. H. 130; *Richards v. Allen*, 17 Me. 296; *Beddinger v. Whittamore*, 2 J. J. Marsh. (Ky.) 563; *Collier v. Coates*, 17 Barb. (N. Y.) 473; *McKinney v. Harvie*, 38 Minn. 18, 35 N. W. Rep. 668; *Nelson v. Shelby M. & I. Co. (Ala.)* 11 South. Rep. 695; *Butler v. Dinan*, 65 Hun, 620, 19 N. Y. Supp. 950. But see *Hartwell v. Young*, 67 Hun, 472, 22 N. Y. Supp. 486, in which it was held that a person orally employed for a longer period than a year may abandon the contract without fault on his employer's part, and recover for the services rendered; post, p. 785.

<sup>121</sup> See *Popp v. Swanke*, 68 Wis. 364, 31 N. W. Rep. 916. Such are the statutes of Alabama, California, Michigan, Nevada, New York, Oregon, Wisconsin.

<sup>122</sup> *Townsend v. Hargraves*, 118 Mass. 325.

*Part Performance.*

At law, unless the statute so provides, part performance of a verbal contract does not take it out of the operation of the statute;<sup>133</sup> but it is otherwise in equity.

*Same—In Equity.*

A court of equity will dispense with the written evidence required by the statute when one of the parties has under certain conditions performed his part of the contract. In England, and in most of the states, it is settled that proof of such a contract will only be admitted where the contract is for an interest in land. Thus, where a contract of service, not to be performed in a year, was broken by the employer by discharge of the employe after some months of service, and an action was brought for wrongful discharge, the court held that the equitable doctrine of part performance was not applicable. "The true ground of the doctrine," it was said, "is that, if the court found a man in occupation of land, or doing such acts with regard to it as would *prima facie* make him liable at law to an action of trespass, the court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken."<sup>134</sup>

Even in the case of contracts relating to land it is not enough that services have been rendered in consideration of a verbal promise to grant lands, nor that the price has otherwise been paid in whole or in part; for the acts relied upon as part performance

<sup>133</sup> *Chicago Attachment Co. v. Sewing-Mach. Co.*, 142 Ill. 171, 81 N. E. Rep. 438; *Henry v. Wells*, 48 Ark. 485, 3 S. W. Rep. 637; *Wheeler v. Frankenthal*, 78 Ill. 124; *Nally v. Reading*, 107 Mo. 350, 17 S. W. Rep. 978; *Brown v. Pollard (Va.)* 17 S. E. Rep. 6. The statute does expressly provide in Iowa, Alabama, and probably in other states, that certain acts of part performance shall take the contract out of the statute. *Louisville & N. R. Co. v. Phillyaw*, 94 Ala. 463, 10 South. Rep. 83; *Price v. Lien (Iowa)* 51 N. W. Rep. 52.

<sup>134</sup> *Brittain v. Rossiter*, 11 Q. B. Div. 123. And see *Osborne v. Kimball*, 41 Kan. 187, 21 Pac. Rep. 163; *Hartwell v. Young*, 67 Hun. 472, 22 N. Y. Supp. 486; *McElroy v. Ludlum*, 32 N. J. Eq. 828. But see, *contra*, *Warner v. Texas & P. Ry. Co.*, 4 O. C. A. 673, 54 Fed. Rep. 922. As to contracts in consideration of marriage, see *ante*, p. 102. As to contracts not to be performed within a year, see *ante*, p. 112.

"must be unequivocally, and in their own nature, referable to some such agreement as that alleged."<sup>135</sup> Where, however, the purchaser has taken possession <sup>136</sup> under a verbal contract for the sale

<sup>135</sup> *Maddison v. Alderson*, 8 App. Cas. 479, 7 Q. B. Div. 174. In this case a promise of a gift of land had been made to a person in consideration of her remaining in the service of the promisor during his lifetime. It was held that the continuance of the service for the required period could not be regarded as exclusively referable to the promised gift. It might have rested on other considerations. And see *Rogers v. Wolfe*, 104 Mo. 1, 14 S. W. Rep. 805; *Shahan v. Swan*, 48 Ohio St. 25, 26 N. E. Rep. 222. But see *Brinton v. Van Cott* (Utah) 33 Pac. Rep. 218; *Smith v. Pierce* (Vt.) 25 Atl. Rep. 1092.

That payment or part payment of the purchase money is not alone sufficient, see *Glass v. Hulbert*, 102 Mass., at page 28; *Brown v. Pollard* (Va.) 17 S. E. Rep. 6; *Kinyon v. Young*, 44 Mich. 339, 6 N. W. Rep. 835; *Peckham v. Balch*, 49 Mich. 179, 13 N. W. Rep. 506; *Boulder Valley D., M. & M. Co. v. Farnham*, 12 Mont. 1, 29 Pac. Rep. 277; *Webster v. Gray*, 37 Mich. 37; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. Rep. 252; *Crabill v. Marsh*, 38 Ohio St. 331; *Townsend v. Vanderwerker*, 20 D. C. 197; *Ducle v. Ford*, 8 Mont. 233, 19 Pac. Rep. 414; *Washington Brewery Co. v. Carry* (Md.) 24 Atl. Rep. 151; *Horn v. Luddington*, 32 Wis. 73; *Forrester v. Flores*, 64 Cal. 24, 28 Pac. Rep. 107; *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. Rep. 297; *Maxfield v. West*, 6 Utah, 327, 379, 23 Pac. Rep. 754, and 24 Pac. Rep. 98; *Humbert v. Brisbane*, 25 S. C. 506; *Gorham v. Dodge*, 122 Ill. 528, 14 N. E. Rep. 44; *Temple v. Johnson*, 71 Ill. 13; *Cronk v. Trumble*, 66 Ill. 428; *Godard v. Donaha*, 42 Kan. 754, 22 Pac. Rep. 708; *Mason v. Ammon* (Pa. Sup.) 11 Atl. Rep. 449. Contra, where the price consisted of the dismissal of actions and marriage with a certain woman. *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. Rep. 146. And see *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. Rep. 227. But marriage alone between the vendor and vendee is not sufficient. *Peek v. Peek*, 77 Cal. 106, 19 Pac. Rep. 227. It is otherwise where there has been fraud in procuring the marriage. *Id.* Promise to devise land to the promisee's daughter if he will allow the promisor to adopt her. *Pond v. Sheean*, 132 Ill. 312, 23 N. E. Rep. 1018. Relinquishing of position by son-in-law, and living on land under agreement by father-in-law to give it to him. *Welch v. Whelpley*, 62 Mich. 15, 28 N. W. Rep. 744. Delivery of deed as part performance. *Luzader v. Richmond*, 128 Ind. 344, 27 N. E. Rep. 736; *Swain v. Burnette*, 89 Cal. 504, 20 Pac. Rep. 1093.

<sup>136</sup> As to what constitutes sufficient possession, see *Hunt v. Lipp*, 30 Neb. 469, 46 N. W. Rep. 632; *Ducle v. Ford*, 138 U. S. 587, 11 Sup. Ct. Rep. 417; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. Rep. 209; *Nibert v. Baghurst* (N. J. Ch.) 25 Atl. Rep. 474; *Swales v. Jackson*, 126 Ind. 282, 26 N. E. Rep. 62. Of part only of land under lease, effect as to balance. *Cochran v. Ward* (Ind. Sup.) 31 N. E. Rep. 581. Possession taken by the vendee without the consent, and

of land, and paid the purchase money or other consideration,<sup>137</sup> or made valuable improvements thereon,<sup>138</sup> equity will enforce performance on the part of the vendor. The ground on which such relief is granted, however, is not because of any binding effect of the contract, but because its enforcement is required to prevent fraud, and courts of equity have general jurisdiction to relieve against fraud.<sup>139</sup> Possession, to constitute such part performance as to warrant the interference of a court of equity, must have been under the contract,<sup>140</sup> and it must be accompanied by payment of

against the protest, of the vendor, is not sufficient. *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. Rep. 252. And see *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. Rep. 828.

<sup>137</sup> *Bechtel v. Cone*, 52 Md. 608; *Jamison v. Dimock*, 95 Pa. St. 52; *Peck v. Williams*, 113 Ind. 256, 15 N. E. Rep. 270; *Carney v. Carney*, 95 Mo. 353, 8 S. W. Rep. 729; *Martin v. Patterson*, 27 S. C. 621, 2 S. E. Rep. 859; *Watts v. Witt* (S. C.) 17 S. E. Rep. 822; *Fitzsimmons v. Allen*, 39 Ill. 440; *Ramsey v. Liston*, 25 Ill. 114; *Lipp v. Hunt*, 25 Neb. 91, 41 N. W. Rep. 143; *Gould v. Banking Co.*, 136 Ill. 60, 26 N. E. Rep. 497; *Denlar v. Hile*, 123 Ind. 68, 24 N. E. Rep. 170. Contra, *Bradley v. Owsley*, 74 Tex. 69, 11 S. W. Rep. 1052.

<sup>138</sup> *Potter v. Jacobs*, 111 Mass. 32; *Smith v. Smith* (Sup.) 4 N. Y. Supp. 669; *Evans v. Miller*, 38 Minn. 245, 36 N. W. Rep. 640; *Moreland v. Lemasters*, 4 Blackf. (Ind.) 383; *Burns v. Fox*, 113 Ind. 205, 14 N. E. Rep. 541; *Barrett v. Forney*, 82 Va. 269; *Cutsinger v. Ballard*, 115 Ind. 93, 17 N. E. Rep. 206; *Blunt v. Tomlin*, 27 Ill. 93; *Hunter v. Mills*, 29 S. C. 72, 6 S. E. Rep. 907; *Burlingame v. Rowland*, 77 Cal. 315, 19 Pac. Rep. 526; *Hibbert v. Aylott*, 52 Tex. 530; *Anderson v. Horn*, 75 Tex. 675, 13 S. W. Rep. 24; *Wallace v. Scoggin*, 17 Or. 476, 21 Pac. Rep. 558; *Manning v. Franklin*, 81 Cal. 205, 22 Pac. Rep. 550; *Holmden v. Janes* (Kan.) 21 Pac. Rep. 501; *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. Rep. 149; *Moulton v. Harris*, 94 Cal. 420, 29 Pac. Rep. 706; *Mudgett v. Clay*, 5 Wash. St. 103, 31 Pac. Rep. 103; *Hunkins v. Hunkins*, 65 N. H. 95, 18 Atl. Rep. 655; *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 9 Sup. Ct. Rep. 286; *Brown v. Sutton*, 129 U. S. 238, 9 Sup. Ct. Rep. 273; *McWhinne v. Martin*, 77 Wis. 182, 46 N. W. Rep. 118; *Johnson v. Hurley* (Mo. Sup.) 22 S. W. Rep. 492. Possession and improvements under lease. *Morrison v. Herrick*, 27 Ill. App. 339, affirmed in 130 Ill. 631, 22 N. E. Rep. 537.

<sup>139</sup> *Caton v. Caton*, L. R. 1 Ch. App. 147; *Semmes v. Worthington*, 38 Md. 298; *Jacobs v. Peterborough & S. R. Co.*, 8 Cush. (Mass.) 223; *Ridgway v. Ridgway*, 69 Md. 242, 14 Atl. Rep. 659; *Wheeler v. Reynolds*, 66 N. Y. 227; *Sullivan v. O'Neal*, 66 Tex. 433, 1 S. W. Rep. 185; *Purcell v. Miner*, 4 Wall. 513; *Clark v. Clark*, 122 Ill. 388, 13 N. E. Rep. 553.

<sup>140</sup> *Jacobs v. Peterborough & S. R. Co.*, 8 Cush. (Mass.) 224; *Purcell v. Miner*.

the purchase money, or by valuable and permanent improvements. Mere possession alone is not enough.<sup>141</sup> Nor are improvements without possession sufficient.<sup>142</sup>

A few of the courts have refused to recognize the doctrine that part performance takes a contract out of the statute,<sup>143</sup> but the doctrine is supported both in England and in this country by an overwhelming weight of authority.

#### *Compelling Execution of Writing.*

In some states, courts of equity, in the exercise of their jurisdiction to grant relief in case of fraud, have compelled the execution of a written contract where the party sought to be charged had agreed to execute it, but afterwards fraudulently refused to keep his promise.<sup>144</sup> Other courts hold that refusal to execute a written

4 Wall. 513; *Ridgway v. Ridgway*, 69 Md. 242, 14 Atl. Rep. 659; *Green v. Groves*, 109 Ind. 519, 10 N. E. Rep. 401; *Miller v. Ball*, 64 N. Y., at page 292; *Birkbeck v. Kelly* (Pa. Sup.) 9 Atl. Rep. 313; *Billingslea v. Ward*, 33 Md. 48; *Boozar v. Teague*, 27 S. C. 348, 3 S. E. Rep. 551; *Semmes v. Worthington*, 38 Md. 298; *Mahana v. Blunt*, 20 Iowa, 142; *Messmore v. Cunningham*, 78 Mich. 623, 44 N. W. Rep. 145; *Pawlak v. Granowski* (Minn.) 55 N. W. Rep. 831; *Rogers v. Wolfe* (Mo. Sup.) 14 S. W. Rep. 805; *Clark v. Clark*, 122 Ill. 388, 13 N. E. Rep. 553; *Wallace v. Rappleye*, 103 Ill. 252; *Kaufman v. Cook*, 114 Ill. 11, 28 N. E. Rep. 378; *Pickereil v. Morss*, 97 Ill. 220; *Wood v. Thornly*, 58 Ill. 464; *Bevans v. Young*, 59 Hun. 619, 13 N. Y. Supp. 497; *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. Rep. 828; *Tunison v. Bradford*, 49 N. J. Eq. 210, 22 Atl. Rep. 1073.

<sup>141</sup> *Glass v. Hulbert*, 102 Mass., at page 32; *Hibbert v. Aylott*, 52 Tex. 530; *Miller v. Ball*, 64 N. Y., at page 292; *Dougan v. Blocher*, 24 Pa. St. 28; *Moore v. Small*, 19 Pa. St. 461; *Galbreath v. Galbreath*, 5 Watts (Pa.) 146; *Ann Berta Lodge v. Levertton*, 42 Tex., at page 26. But see *Andrew v. Babcock* (Conn.) 26 Atl. Rep. 715; *Kennemore v. Kennemore*, 26 S. C. 251, 1 S. E. Rep. 881.

<sup>142</sup> *Wooldridge v. Hancock* (Tex. Sup.) 6 S. W. Rep. 818.

<sup>143</sup> *Dunn v. Moore*, 3 Ired. Eq. (N. C.) 364; *Ridley v. McNairy*, 2 Humph. (Tenn.) 174; *Beaman v. Buck*, 9 Smedes & M. (Miss.) 207.

<sup>144</sup> *Equitable Gaslight Co. v. Baltimore Coal Tar, etc., Co.*, 63 Md. 285; *Graft v. Loucks*, 138 Pa. St. 453, 21 Atl. Rep. 203; *Baker v. Baker* (S. D.) 49 N. W. Rep. 1064; *McDonald v. Youngbluth*, 46 Fed. Rep. 836. In Iowa the court decreed specific performance of a parol agreement to assign a patent right, though Rev. St. U. S. § 4898, requires assignments to be in writing. *Searle v. Hill*, 73 Iowa, 367, 35 N. W. Rep. 400.



contract as agreed is not such a fraud as will take the contract out of the statute.<sup>146</sup>

*Part Performance—Recovery on Implied Contract.*

Where one of the parties to a verbal contract within the statute of frauds performs his promise in whole or in part by the payment of money, the doing of work, the incurring of expense, or otherwise, and the other party refuses to carry out the agreement, the law implies, or rather creates, a promise to repay the money, or to pay for the work, on which an action will lie, unaffected by the statute.<sup>146</sup>

*The Contract as a Defense.*

The provision that "no action shall be brought" on verbal contracts within the statute not only prevents suit on such a contract, but prevents such a contract from being set up as a defense; as for instance, in an action on the quantum meruit by a party who has partly performed under it.<sup>147</sup>

<sup>146</sup> Caylor v. Roe, 99 Ind. 1; Jackson v. Myers, 120 Ind. 504, 22 N. E. Rep. 90, and 23 N. E. Rep. 86; Feeney v. Howard, 79 Cal. 525, 21 Pac. Rep. 984.

<sup>147</sup> Whipple v. Parker, 29 Mich. 369; Whittaker v. Burrows (Sup.) 24 N. Y. Supp. 1011; Patten v. Hicks, 43 Cal. 509. And see cases cited in following note. As to recovery of money or other consideration paid, see Welch v. Darling, 59 Vt. 136, 7 Atl. Rep. 547; Herrick v. Newell, 49 Minn. 198, 51 N. W. Rep. 819; Schroeder v. Loeber, 75 Md. 195, 23 Atl. Rep. 579, and 24 Atl. Rep. 226; Worth v. Patton (Ind. Sup.) 31 N. E. Rep. 1130; Nelson v. Shelby M. & I. Co. (Ala.) 11 South. Rep. 095. Recovery for services rendered. Cadman v. Markle, 76 Mich. 448, 43 N. W. Rep. 315; Sprague v. Haines, 68 Tex. 215, 4 S. W. Rep. 371; Stevens' Ex'rs v. Lee, 70 Tex. 279, 8 S. W. Rep. 40; Hartwell v. Young, 67 Hun, 472, 22 N. Y. Supp. 486; Jeffery v. Walker (Sup.) 25 N. Y. Supp. 161; Wousettler v. Lee, 40 Kan. 367, 19 Pac. Rep. 862; Springer v. Bien (Com. Pl. N. Y.) 10 N. Y. Supp. 530; Schoonover v. Vachon, 121 Ind. 3, 22 N. E. Rep. 777; Miller v. Eldredge, 126 Ind. 461, 27 N. E. Rep. 132; Taggart v. Tevanny, 1 Ind. App. 339, 27 N. E. Rep. 511; Koch v. Williams (Wis.) 52 N. W. Rep. 257. Contra, Kriger v. Leppel, 42 Minn. 6, 43 N. W. Rep. 484. Recovery of expenses incurred, or money paid for the use of the other party. Sprague v. Haines, 68 Tex. 215, 4 S. W. Rep. 371. Recovery for use and occupancy of land from one who has used it under a parol agreement which he refuses to carry out. Walker v. Shackelford (Ark.) 5 S. W. Rep. 887; post, p. 784.

<sup>148</sup> King v. Welcome, 5 Gray (Mass.) 41; Baker v. Lauterbach, 68 Md. 64, 11 Atl. Rep. 704; McGinnis v. Fernandes, 126 Ill. 228, 19 N. E. Rep. 44; Creighton v. Sanders, 89 Ill. 543; Wheeler v. Frankenthal, 78 Ill. 124.

*Who may Plead the Statute.*

The benefits of the statute of frauds are personal, and it can only be set up by the parties to the contract, or their privies.<sup>148</sup>

*Waiver of Statute.*

A contract not put in writing, as required by the statute of frauds, not being void, but simply unenforceable by suit, the failure of the contract to comply with the statute may be waived by the party to be charged,<sup>149</sup> and it is generally held to have been waived if not pleaded.<sup>150</sup>

*Conflict of Laws.*

By the rules of private international law the validity of a contract, so far as regards its formation, is determined by the *lex loci contractus*; but the procedure, including the proof, in an action on a contract is governed by the *lex fori*. In a leading English case, in which action was brought in England on a verbal contract made

<sup>148</sup> *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Mewburn v. Bass* (Ala.) 2 South. Rep. 520; *Briggs v. United States*, 143 U. S. 346, 12 Sup. Ct. Rep. 391; *Dailey v. Kinsler*, 35 Neb. 835, 53 N. W. Rep. 973; *Best v. Davis*, 44 Ill. App. 624; *Grundies v. Kelso*, 41 Ill. App. 200; *Houser v. Lamont*, 55 Pa. St. 311; *Book v. Justice Min. Co.*, 58 Fed. Rep. 106; *Bullion & Exch. Bank v. Otto*, 59 Fed. Rep. 256; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *King v. Bushnell*, 121 Ill. 656, 13 N. E. Rep. 245; *St. Louis, etc., R. Co. v. Clark* (Mo. Sup.) 25 S. W. Rep. 192.

<sup>149</sup> *Montgomery v. Edwards*, 46 Vt. 151; *Cosand v. Bunker* (S. D.) 50 N. W. Rep. 84; *Westfall v. Parsons*, 16 Barb. (N. Y.) 645; *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. Rep. 753; *Brakefield v. Anderson*, 87 Tenn. 206, 10 S. W. Rep. 360.

<sup>150</sup> *Wells v. Monihan*, 59 Hun, 617, 13 N. Y. Supp. 156; *Id.*, 129 N. Y. 161, 29 N. E. Rep. 232; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. Rep. 784; *Cosand v. Bunker* (S. D.) 50 N. W. Rep. 84; *Espalla v. Wilson*, 86 Ala. 487, 5 South. Rep. 867; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Maybee v. Moore*, 90 Mo. 340, 2 S. W. Rep. 471; *Cozart v. Land Co.* (N. C.) 18 S. E. Rep. 337; *Taylor v. Penquite*, 35 Mo. App. 389; *Citty v. Southern Q. M. Co.* (Tenn.) 24 S. W. Rep. 121; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. Rep. 220; *Iverson v. Girkel* (Minn.) 57 N. W. Rep. 800; *Quinlin v. Raymond*, 14 Daly, 87; *Hamill v. Hall* (Colo. App.) 35 Pac. Rep. 927; *Englehorn v. Reitlinger*, 55 N. Y. Super. Ct. 485. *Contra*, *Harris v. Frank*, 81 Cal. 280, 22 Pac. Rep. 850; *Semmes v. Worthington*, 38 Md. 298; *Popp v. Swanke*, 68 Wis. 364, 31 N. W. Rep. 916; *Berrien v. Southack* (City Ct. N. Y.) 7 N. Y. Supp. 324; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. Rep. 465; *Bernhardt v. Walls*, 29 Mo. App. 206.

in France, and which was valid and enforceable by the French law, it was held that, as the statute of frauds did not go to the existence of the contract, but affected the procedure only, and prevented proof, the statute of frauds governed the case, and prevented a recovery.<sup>151</sup> This case has been followed by the courts of some of our states, and has been approved by the federal supreme court.<sup>152</sup> The courts of many other states, however, have held the contrary, and will enforce a contract so long as it is not within the statute of frauds of the state in which it was made, and, on the other hand, will refuse to enforce a contract which is not within their own statute, but is within the statute of the state in which it was made.<sup>153</sup>

#### SAME—CONTRACTS WITHIN SECTION 17.

54. Section 17 applies to "contracts for the sale of any goods, wares, and merchandises for the price of £10 sterling or upwards." The limit as to value varies somewhat in the different states.

55. The section applies :

- (a) To executory as well as executed contracts of sale.
- (b) To sales at auction as well as private sales.
- (c) In most states, to sales of choses in action, such as shares of stock, bonds, notes, etc.
- (d) To sales of growing crops raised by cultivation and labor.
- (e) To sales of timber and other natural produce of land, where title is not to pass until after severance, and possibly in some states where it is to pass before.

<sup>151</sup> *Leroux v. Brown*, 12 C. B. 801.

<sup>152</sup> *Downer v. Chesebrough*, 36 Conn. 39; *Hunt v. Jones*, 12 R. I. 265; *Pritchard v. Norton*, 106 U. S. 134, 1 Sup. Ct. Rep. 102.

<sup>153</sup> *Decosta v. Davis*, 24 N. J. Law, 319; *Cochran v. Ward* (Ind. Sup.) 29 N. E. Rep. 795; *Denny v. Williams*, 5 Allen (Mass.) 1; *Allshouse v. Ramsey*, 6 Whart. (Pa.) 331; *Houghtaling v. Ball*, 20 Mo. 563; *Low v. Andrews*, 1 Story, 38, Fed. Cas. No. 8,559.

**56. It does not apply to contracts for work and labor, but a contract is not deemed one for work and labor—**

- (a) In a few jurisdictions, where it contemplates the ultimate delivery of a chattel, though it has to be made.
- (b) In other jurisdictions, where the chattel is in existence, though labor may have to be expended on it.
- (c) In other, probably most, jurisdictions, where the chattel, though to be made, is one which the seller ordinarily makes and sells in the course of his business. It is otherwise if it is one which must be specially manufactured.
- (d) In some jurisdictions the contract is for work and labor if any labor must be bestowed on the article before delivery.

**57. The statute expressly excepts contracts of sale from its operation—**

- (a) Where the buyer accepts and actually receives part of the goods sold; but there must be—
  - (1) Delivery by the seller.
  - (2) Acceptance by the buyer.
  - (3) Actual receipt by the buyer.
- (b) Where the buyer gives something in earnest to bind the bargain, or in part payment.
  - (1) The payment must be actually made.
  - (2) It must be of something of value, but need not be money.
  - (3) It may be made at any time before action, except where the statute requires it to be made at the time of the contract.

The statute applies to all contracts for the sale of goods, wares, and merchandises of or above the value specified. Though there was doubt in England, to remove which a special statute was

enacted, it has been held with us that the statute applies not only to executed contracts of sale, but also to executory contracts, as, for instance, where the goods are not specified, but are to be afterwards obtained by the seller, or selected and set apart to the purchaser, or where something is to be done, such as weighing, measuring, or testing to ascertain the price.<sup>154</sup>

It also applies to sales at public auction as well as private sales.<sup>155</sup>

A contract for the sale of goods is not taken out of the operation of the statute by the fact that there are other stipulations to which the statute does not apply.<sup>156</sup> The contract must be for the sale of goods, and a promise, therefore, by the seller of bonds or other goods to take them back is not within the statute. It is a promise to rescind the sale, not a promise to sell.<sup>157</sup> So, also, a contract by which one of the parties is to purchase goods for the other at a certain price, the latter agreeing to receive and pay for them on delivery, is a contract of agency, and not of bargain and sale, and is, therefore, not within the statute.<sup>158</sup> Nor is an oral agreement for a trading venture, by which one party agrees to account to the other for half the profits in consideration that the other shall bear half the losses, within the statute.<sup>159</sup>

*"Goods, Wares, and Merchandises."*

It has been held in England that, as shares of stock in corporations are mere choses in action, and incapable of partial delivery and acceptance, contracts for their sale are not covered by this section of the statute;<sup>160</sup> and the courts of some of our states have taken the same view.<sup>161</sup> In other states it is held that shares of stock, promissory notes, bonds, and the like, are "goods, wares,

<sup>154</sup> *Bennett v. Hull*, 10 Johns. (N. Y.) 364; *Lamb v. Crafts*, 12 Metc. (Mass.) 353; *Edwards v. Grand Trunk R. Co.*, 48 Me. 379; *Newman v. Morris*, 4 Har. & M. (Md.) 421; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Cason v. Chery*, 6 Ga. 554; *Sawyer v. Ware*, 36 Ala. 676.

<sup>155</sup> *Singstack v. Harding*, 4 Har. & J. 186. See, also, ante, p. 126.

<sup>156</sup> *Hanson v. Marsh*, 40 Minn. 1, 40 N. W. Rep. 841.

<sup>157</sup> *Johnston v. Trask*, 116 N. Y. 136, 22 N. E. Rep. 377.

<sup>158</sup> *Hatch v. McBrien*, 83 Mich. 159, 47 N. W. Rep. 214.

<sup>159</sup> *Coleman v. Eyre*, 45 N. Y. 41; *Green v. Brookins*, 23 Mich. 48.

<sup>160</sup> *Humble v. Mitchell*, 11 Adol. & El. 205. And see *Pickering v. Appleby*, Comyn, 354.

<sup>161</sup> *Whittemore v. Gibbs*, 24 N. H. 484; *Vawter v. Griffin*, 40 Ind. 593.

and merchandises," and that contracts for their sale are within the statute.<sup>163</sup> It has also been held that a sale of book accounts,<sup>163</sup> or of land scrip,<sup>164</sup> is within the statute, but not an agreement for sale of an interest in an invention before letters patent are obtained.<sup>165</sup>

In some states the statute uses the words "personal property," instead of "goods, wares, and merchandises," and these would, of course, apply to choses in action.<sup>166</sup> In other states the statute expressly mentions choses in action.

As we have already seen, crops and other produce of land, obtained by labor and cultivation, called "*fructus industriales*," are not land, nor an interest therein, within the fourth section. They are regarded as goods, wares, and merchandise, within the seventeenth section.<sup>167</sup> So, also, a sale of "*fructus naturales*," or the natural growth of land, not being of an interest in land where title is not to pass until after severance, is regarded as within the seventeenth section. Some courts, indeed, hold this to be so, though title is to pass before severance.<sup>168</sup> The question, however, is intricate, and the authorities conflicting, and it cannot be properly treated at any length in an elementary work on contracts.

A contract for the publication of an advertisement is not a contract for the sale of goods, chattels, or things in action.<sup>169</sup>

<sup>163</sup> *Tisdale v. Harris*, 20 Pick. (Mass.) 9; *Boardman v. Cutter*, 128 Mass. 388; *Baldwin v. Williams*, 3 Metc. (Mass.) 365; *Gooch v. Holmes*, 41 Me. 523; *Hudson v. Weir*, 29 Ala. 294; *Pray v. Mitchell*, 60 Me. 430; *Calvin v. Williams*, 3 Har. & J. (Md.) 38; *North v. Forest*, 15 Conn. 400; *Hinchman v. Lincoln*, 124 U. S. 38, 8 Sup. Ct. Rep. 369; *Bernhardt v. Walls*, 29 Mo. App. 206; *Greenwood v. Law* (N. J. Err. & App.) 26 Atl. Rep. 134. A subscription to stock is not within the statute. *Webb v. Balto. & E. S. R. Co.* (Md.) 26 Atl. Rep. 113. Effect of rules of stock exchange, making oral contracts binding on sales between members. *Ryers v. Tuska* (Com. Pl. N. Y.) 14 N. Y. Supp. 926.

<sup>164</sup> *Walker v. Supple*, 54 Ga. 178.

<sup>165</sup> *Smith v. Bouck*, 33 Wis. 19.

<sup>166</sup> *Somerby v. Buntin*, 118 Mass. 279; *Blakeney v. Goode*, 30 Ohio St. 350. But see *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. Rep. 279.

<sup>167</sup> *Southern Life Ins. & T. Co. v. Cole*, 4 Fla. 359.

<sup>168</sup> Ante, p. 106.

<sup>169</sup> Id.

<sup>170</sup> *Goodland v. Le Clair*, 78 Wis. 176, 47 N. W. Rep. 268.

*Value.*

In most states the statute fixes the value of the goods under which contracts for their sale may be made orally at \$50, substantially following the English statute; but in some the value is fixed at a greater or less amount. In two, at least, no value at all is fixed, and all contracts of sale are within the statute.<sup>170</sup>

Where several articles, all of which exceed, but no one of which alone reaches, the value specified in the statute, are purchased independently at different times, each purchase is a separate contract, and is not within the statute; but it is otherwise if they are all purchased at the same time, in one and the same transaction.<sup>171</sup>

*Contracts for Work and Labor.*

A difficult question has arisen, under this section of the statute, where labor has to be expended on the thing sold before the contract is executed, and the property transferred, as to whether the contract is for the sale of goods within the seventeenth section, or for work and labor, and therefore enforceable if to be performed within a year, so as not to be within the fourth section. The decisions on this question are not in accord.

In England it is held that the contract is for a sale of goods if it contemplates the ultimate delivery of a chattel. "I do not think," it was said in an English case, "that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill or labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."<sup>172</sup>

The courts of this country generally repudiate this doctrine, but they differ as to what they deem the correct rule.<sup>173</sup>

<sup>170</sup> In Florida and Iowa no limit at all is specified. In Arkansas, Maine, Missouri, New Jersey, the limit is \$30. In California and Idaho it is \$200. In Vermont it is \$40. In New Hampshire it is \$33.

<sup>171</sup> *Baldehy v. Parker*, 2 Barn. & C. 37.

<sup>172</sup> *Lee v. Griffin*, 1 Best & S. 272. Contra, as to agreement to paint a portrait, *Turner v. Mason*, 65 Mich. 662, 32 N. W. Rep. 846.

<sup>173</sup> But see *Burrell v. Highleyman*, 33 Mo. App. 183. In some states the statute expressly excepts goods to be manufactured. *Flynn v. Dougherty*, 91 Cal. 609, 27 Pac. Rep. 1080.

In some states it is held that a contract for the sale of something which the seller ordinarily makes and sells in the course of his business is a contract for the sale of goods, and not for work and labor, though he may not have the goods on hand, but may have to manufacture them; but, if the goods are not such as he ordinarily makes, and have to be specially manufactured for the buyer, the contract is for work and labor.<sup>174</sup>

In other states a distinction is made between goods in existence when the contract is made and goods that have to be manufactured, and it is held that when the chattel is in existence the contract should be deemed one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and nonexisting chattels.<sup>175</sup>

Still other courts hold that the contract is not for the sale of goods, but for work and labor, where, under the contract, any labor is to be bestowed upon the article before it is delivered.<sup>176</sup>

In some states this question is regulated by special provisions of the statute.<sup>177</sup>

#### *Acceptance and Receipt.*

The statute does not require a memorandum if the buyer "accept part of the goods so sold, and actually receive the same." To take

<sup>174</sup> *Goddard v. Binney*, 115 Mass. 450; *Lamb v. Crafts*, 12 Metc. (Mass.) 353; *Prescott v. Locke*, 51 N. H. 94; *Mixer v. Howarth*, 21 Pick. (Mass.) 205; *Pratt v. Miller*, 109 Mo. 78, 18 S. W. Rep. 965; *Atwater v. Hough*, 29 Conn. 506; *Crockett v. Scribner*, 64 Me. 447; *Edwards v. Grand Trunk R. Co.*, 48 Me. 379; *Finney v. Apgar*, 31 N. J. Law, 267; *Meincke v. Falk*, 55 Wis. 427, 13 N. W. Rep. 545; *Central Lith. & E. Co. v. Moore*, 75 Wis. 170, 43 N. W. Rep. 1124. See, also, *Passaic Manuf'g Co. v. Hoffman*, 3 Daly (N. Y.) 495.

<sup>175</sup> *Parson v. Loucks*, 48 N. Y. 17; *Cooke v. Millard*, 65 N. Y. 352; *Deal v. Maxwell*, 51 N. Y. 652; *Higgins v. Murray*, 73 N. Y. 252; *Alfred Shrimpton & Sons v. Dworsky* (Com. Pl. N. Y.) 21 N. Y. Supp. 461; *Pawelski v. Hargreaves*, 47 N. J. Law, 334; *Pitkin v. Noyes*, 48 N. H. 294; *Rutty v. Consol. Fruit Jar Co.* (Sup.) 13 N. Y. Supp. 331. A contract to paint a portrait is not within the statute. *Turner v. Mason*, 65 Mich. 662, 32 N. W. Rep. 846. Nor is a contract for the manufacture of circulars. *Hinds v. Kellogg* (Com. Pl. N. Y.) 13 N. Y. Supp. 922.

<sup>176</sup> *Eichelberger v. McCauley*, 5 Har. & J. (Md.) 213; *Rentch v. Long*, 27 Md. 188; *Bagby v. Walker* (Md.) 27 Atl. Rep. 1033.

<sup>177</sup> *Mighell v. Dougherty* (Iowa) 53 N. W. Rep. 402.



the contract out of the statute under this clause, there must be a receipt of the goods, or a part of them, as well as an acceptance.<sup>178</sup> Mere words, without acts showing acceptance and receipt, are not enough.<sup>179</sup> It makes no difference at what time with reference to the contract the goods are accepted, or at what time with reference to the contract or the acceptance they are received, and they may be accepted at one time and received at another,<sup>180</sup> but both acceptance and receipt are necessary. The terms are not synonymous; there may be acceptance without receipt, and receipt without acceptance. If, for instance, the buyer looks at the goods, and says that he will take them, but leaves them in the possession of the seller, he accepts, but does not receive, them; and, if he takes them into his possession to examine them, and refuses to take them, he receives them, but there is no acceptance. In neither case are the requirements of the statute satisfied.<sup>181</sup>

Of course, delivery by the seller is essential, for without this an acceptance and actual receipt by the buyer would be impossible. There can be no acceptance and receipt in the absence of a delivery with the intention of vesting the right of possession in the purchaser.

<sup>178</sup> *Boardman v. Spooner*, 13 Allen, 353; *Shindler v. Houston*, 1 N. Y. 261; *Stone v. Browning*, 68 N. Y. 598; *Powder River L. S. Co. v. Lamb* (Neb.) 56 N. W. Rep. 1019; *Houghtaling v. Ball*, 19 Mo. 84; *Alderton v. Buchoz*, 3 Mich. 322; *Smith v. Evans* (S. C.) 15 S. E. Rep. 344; *Atwood v. Lucas*, 53 Me. 508; *Maxwell v. Brown*, 39 Me. 98; *Lay v. Neville*, 25 Cal. 545; *Spear v. Bach*, 82 Wis. 192, 52 N. W. Rep. 97; *Edwards v. Grand Trunk R. Co.*, 48 Me. 379; *Hill v. McDonald*, 17 Wis. 97. Delivery on Sunday, subsequent acceptance. See *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. Rep. 771. Surrender of a farm and the tools on it to the vendee under an oral sale, and use of the tools by him, takes the sale of the tools out of the statute. *Wilkinson v. Wilkinson*, 61 Vt. 409, 17 Atl. Rep. 795. Delivery and acceptance of bar in a building belonging to third person shown by acts without removal. *Bowe v. Ellis* (Com. Pl. N. Y.) 22 N. Y. Supp. 369.

<sup>179</sup> *Shindler v. Houston*, *supra*.

<sup>180</sup> *McKnight v. Dunlop*, 5 N. Y. 537; *Marsh v. Hyde*, 3 Gray (Mass.) 331; *Gault v. Brown*, 48 N. H. 183; *Richardson v. Squires*, 37 Vt. 640; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. Rep. 771; *Amson v. Dreher*, 35 Wis. 615; *McCarthy v. Nash*, 14 Minn. 127 (Gil. 95); *Ortliff v. Klitzke*, 43 Minn. 154, 44 N. W. Rep. 1085.

<sup>181</sup> *Hewes v. Jordan*, 39 Md. 472; *Knight v. Mann*, 118 Mass. 143; *Alfred Shrimpton & Sons v. Dworsky* (Com. Pl. N. Y.) 21 N. Y. Supp. 461; *Stone v. Browning*, 68 N. Y. 598.

Delivery, however, or attempt to deliver, by the seller, as where he ships according to the buyer's directions, does not take the case out of the statute if the buyer refuses to accept when the goods are tendered.<sup>182</sup> The goods, however, having been once accepted cannot be afterwards rejected so as to bring the sale within the operation of the statute.<sup>183</sup>

*Earnest and Part Payment.*

Nor does the statute apply to contracts of sale if the buyer "give something in earnest to bind the bargain or in part payment."

There are few decisions as to the meaning of "earnest." In a Massachusetts case each of the parties to an oral contract for the sale of goods had deposited money in the hands of a third person as a forfeiture in case either party should refuse to fulfill the contract, and it was contended that this amounted to a payment in earnest to bind the bargain, but it was held otherwise. "As used in the statute of frauds," it was said, "'earnest' is regarded as a part payment of the price."<sup>184</sup> This, however, need not necessarily be so; so long as there is an actual payment for the purpose of binding the bargain, it cannot be necessary to ask whether it was to apply on the price.<sup>185</sup>

To constitute payment in earnest or in part payment there must be an actual payment. A promise to pay would not be enough, nor would an unaccepted offer or tender of payment.<sup>186</sup>

<sup>182</sup> *Jones v. Mechanics' Bank*, 29 Md. 287. And see *Caulkins v. Hellman*, 47 N. Y. 449; *Shepherd v. Pressey*, 32 N. H. 49; *Scotten v. Sutter*, 37 Mich. 526; *Billin v. Henkel*, 9 Colo. 394, 13 Pac. Rep. 420; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. Rep. 465; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. Rep. 892; *Agnew v. Dumas* (Vt.) 23 Atl. Rep. 634; *Galvin v. Mackenzie*, 21 Or. 184, 27 Pac. Rep. 1039. Contra, *Liggett v. Tobacco Co.* (Iowa) 56 N. W. Rep. 417. But delivery to the buyer's agent as directed is enough. *Snow v. Warner*, 10 Metc. (Mass.) 132; *Dean v. Tallman*, 105 Mass. 443; *Schroder v. Palmer Hardware Co.*, 88 Ga. 578, 15 S. E. Rep. 327. Acceptance of goods shipped takes the case out of the statute, notwithstanding a prior telegram not to ship them. *Sullivan v. Sullivan*, 70 Mich. 533, 38 N. W. Rep. 472.

<sup>183</sup> *Morton v. Tibbitts*, 15 Q. B. 428.

<sup>184</sup> *Howe v. Hayward*, 108 Mass. 54.

<sup>185</sup> *Langfort v. Tiler*, 1 Salk. 113.

<sup>186</sup> *Artcher v. Zeh*, 5 Hill (N. Y.) at page 205; *Walrath v. Ingles*, 64 Barb. 255; *Edgerton v. Hedge*, 41 Vt. 676. Giving the seller credit on an existing

The payment need not be of money, but may be of anything of value in the eye of the law.<sup>187</sup> A promise to pay a debt due by the seller, whereupon he is discharged by the debtor, has been held sufficient.<sup>188</sup>

In some states the statute expressly requires the payment to be made at the time of the contract, in which case a payment not made at the time is not sufficient.<sup>189</sup> "But," said the court in a New York case, "when a contract for the sale of personal property, valid at common law, is made, and the buyer afterwards pays expressly to bind the contract, or, when payment is made, the parties then reaffirm or restate the terms of the contract, and their minds then meet so as to make a contract, the statute is undoubtedly satisfied. Such a payment is made at the time of the contract, and not afterwards."<sup>190</sup> In most of the states there is no such requirement as this, and, in its absence, or even where there is a somewhat similar requirement, it is held that payment, like the memorandum when it is resorted to,<sup>191</sup> may be made at any time before action on the contract.<sup>192</sup>

#### SAME—FORM REQUIRED BY SECTION 17.

58. This section requires that "some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto authorized."

debt is payment. *Norwegian Plow Co. v. Hawthorn*, 71 Wis. 529, 37 N. W. Rep. 825.

<sup>187</sup> *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Dow v. Worthen*, 37 Vt. 108. Giving the buyer of grain the use of sacks where the use of the sacks was estimated as part of the price to be paid, is part payment. *Weir v. Hudnut*, 115 Ind. 525, 18 N. E. Rep. 24.

<sup>188</sup> *Cotterill v. Stevens*, 10 Wis. 308.

<sup>189</sup> *Hunter v. Wetsell*, 57 N. Y. 375, 84 N. Y. 549; *Allis v. Read*, 45 N. Y. 142; *Kerkhof v. Atlas Paper Co.*, 68 Wis. 674, 32 N. W. Rep. 706.

<sup>190</sup> *Hunter v. Wetsell*, *supra*.

<sup>191</sup> *Ante*, p. 116.

<sup>192</sup> *Thompson v. Alger*, 12 Metc. (Mass.) 428. And see *Davis v. Moore*, 13 Me. 424; *Gault v. Brown*, 48 N. H., at page 189.

**59. The rules as to the form required by this section are the same as in case of section 4, except that—**

**EXCEPTION—The consideration need not appear.**

Where, in the absence of a part acceptance, and receipt of the goods sold, or payment in earnest or in part payment, a note or memorandum in writing is resorted to, it must comply with the rules which we have already stated in dealing with the form required by section 4, with the single exception that the consideration for the sale need not appear in writing.<sup>193</sup> Since the seventeenth section only applies to the sale of goods, it will be presumed, in the absence of a specified consideration for the sale, that there was a promise to pay a reasonable price, provided, of course, there has been no express verbal agreement as to price which will rebut such presumption.

**SAME—EFFECT OF NONCOMPLIANCE WITH SECTION 17.**

**60. The seventeenth section declares that no contract which fails to comply with its requirements "shall be allowed to be good."**

**61. As in the case of the fourth section, it is generally held that this does not go to the existence of the contract, but merely prevents its enforcement by requiring written evidence.**

**62. In Illinois, and probably other states, this section has not been enacted.**

It will be noticed that, if there be no acceptance and receipt, no part payment, and no memorandum in writing, the section declares that the contract shall not "be allowed to be good," thus differing from section 4, which merely declares that no action shall be brought. In England it seems not to have been directly decided whether these words mean that the contract shall be utterly void, or merely incapable of being sued upon, as in case of contracts under section 4; and the dicta of the judges are conflicting.

<sup>193</sup> Pol. Cont. 161; Leake, Cont. 270.

Mr. Anson and Mr. Pollock, in their works on Contracts, take the latter position.<sup>194</sup> In this country the question has been decided, and it has been held that the difference in the wording of the two sections of the statute in this respect is immaterial, and that failure of a contract within the seventeenth section to comply with its requirements, does not go to its existence, but merely renders it unenforceable by suit, as is the case with verbal contracts within the fourth section.<sup>195</sup> It has even been so held as to a statute declaring that no contract which failed to comply with its requirements should be good "and valid."<sup>196</sup> The decisions are based not so much on the strict meaning of these words as on the policy of the statute, which was enacted, not to prevent the voluntary carrying out of verbal contracts, but to shut the doors against fraud and perjury. In Missouri, however, it has been held that section 17, unlike section 4, goes to the very existence of the contract.<sup>197</sup>

<sup>194</sup> Anson, Cont. 67; Pol. Cont. 605.

<sup>195</sup> *Townsend v. Hargraves*, 118 Mass. 325. See, also, ante, p. 128.

<sup>196</sup> *Townsend v. Hargraves*, supra.

<sup>197</sup> *Houghtaling v. Ball*, 20 Mo. 563.

## CHAPTER V.

### CONSIDERATION.

- 63-65. Consideration Defined.
- 66-68. Necessity for Consideration, and Presumption.
- 69, 70. From Whom Consideration Must Move.
- 71. Adequacy of Consideration.
- 72. Sufficiency or Reality of Consideration
  - 73-75. Mutual Promises—Mutuality.
  - 76-78. Forbearance to Exercise a Right.
  - 79-81. Forbearance to Do What One Cannot Legally Do.
  - 82. Gratuitous Bailment.
  - 83. Natural Affection.
  - 84. Moral Obligation.
  - 85. Impossible Promises.
  - 86. Vague Promises.
- 87, 88. Doing What One is Bound to Do.
- 89. Legality of Consideration.
- 90. Consideration in Respect of Time.
- 91. Past Consideration.
- 92, 93. Failure of Consideration.

### CONSIDERATION DEFINED.

63. Consideration is that which moves from the promisee, or to the promisor, at the express or implied request of the latter, in return for his promise.

64. As the term is used in the law of contract, it means a "valuable" consideration; that is, something having value in the eye of the law. It may consist either in "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

65. It must be distinguished from motive, and from a "good" consideration, or such as is founded on natural duty and affection, and which the law does not regard as "valuable."

We shall presently see that the law requires every simple contract to be based on what it deems a valuable consideration, and we shall also take up in turn the different forms which consideration may assume, and explain at length what is deemed a consideration.<sup>1</sup> At the outset, however, it will be well to explain in a general way what we mean when we speak of the consideration for a promise. Consideration means that which moves from the promisee or to the promisor, at the latter's request, in return for his promise. If, for instance, one man, by paying another a sum of money, procures a promise from the latter in return to do something for his benefit, the money paid is the consideration for the promise. Consideration, however, need not necessarily be the payment of money. As said in an English case, it may consist in some other "right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other;"<sup>2</sup> provided, however, the benefit conferred, or detriment suffered is deemed of value in the eye of the law.<sup>3</sup> There must, as we shall see, be some real benefit conferred, or some real detriment suffered.<sup>4</sup> If a person does work for another on the latter's express or implied promise to pay for it; or if a person gives another permission to use his property in return for a promise; or if a person gives up his right to sue another, on the latter's promise to pay

<sup>1</sup> For the history of consideration, the student should read Anson, *Cont.* 36; *Poll. Cont.* 179; Holmes, *Com. Law*, 253-271, 284-287.

<sup>2</sup> *Currie v. Misa*, L. R. 10 Exch. 162; *Handrahan v. O'Regan*, 45 Iowa, 298; *Devecmon v. Shaw*, 67 Md. 199, 14 Atl. Rep. 474; *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. Rep. 256; *Bainbridge v. Firmstone*, 8 Adol. & E. 743; *Byrne v. Cummings*, 41 Miss. 192; *Conover v. Stillwell*, 34 N. J. Law, 54; *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. Rep. 365; *Wolford v. Powers*, 85 Ind. 294; *Sanders v. Carter* (Ga.) 17 S. E. Rep. 345; *Dorwin v. Smith*, 35 Vt. 69; *Glasgow v. Hobbs*, 32 Ind. 440; *Train v. Gold*, 5 Pick. (Mass.) 380; *Emerson v. Slater*, 22 How. 43; *Taylor v. Williams*, 120 Ind. 414, 22 N. E. Rep. 118. And see the old cases of *Traver v. —* (1667) 1 Sid. 57; *Paynter v. Chamberlyn* (1639) 1 Rolle, Abr. 22; *Hawes v. Smith* (1675) 2 Lev. 122.

<sup>3</sup> *Post*, p. 164.

<sup>4</sup> *Post*, p. 164. A gift of bonds *inter vivos*, for instance, invalid by reason of nondelivery, is not a sufficient consideration for a promise by the donor to pay the donee the value of the bonds in return for their use and appropriation by him for the purposes of his own business. *Flanders v. Blandy*, 45 Ohio St. 108, 12 N. E. Rep. 321.

money or do some other act,—there is in each case either a benefit accruing to the promisor, or a detriment suffered by the promisee, or both; and this is the consideration for the promise. So, also, if a person promises another to do something on the latter's promising him to do something, as where one man promises another to sell him goods, and the promisee promises to buy them, and pay for them, a right is conferred by each to the benefit of the other's promise, and a responsibility is undertaken by each. The promise of each is the consideration for the promise of the other.<sup>5</sup>

The fact that the benefit conferred or detriment suffered is slight does not render it any the less a valuable consideration. Any real benefit or detriment is sufficient, for, as we shall presently see, the courts will not inquire whether the consideration is adequate. If it is real, that is enough. The mere appointment of a person as guardian, for instance, is sufficient to support his promise to act without compensation;<sup>6</sup> and the naming of a child after a person will support his promise to pay a large sum of money.<sup>7</sup>

There may even be a consideration without the accrual of any benefit at all to the promisor. It is sufficient if something real has been done, forborne, suffered, or undertaken by the promisee. If he has suffered any detriment, however slight, or, though he has suffered no real detriment, if he has done what he was not otherwise bound to do, in return for the promise, he has given a consideration; and the court will not ask whether the promisor was benefited.<sup>8</sup> Where, for instance, the owner of boilers gave another permission to weigh them on the latter's promise to return them in good condition, the permission and advantage taken of it was held a sufficient consideration for the promise. "The defendant," said the

<sup>5</sup> *Punk v. Hough*, 29 Ill. 145; *Earle v. Angell*, 157 Mass. 294, 32 N. E. Rep. 164. And see post, p. 165.

<sup>6</sup> *State v. Baker*, 8 Md. 44. Contra, *Smith's Case*, 3 Leon. 88.

<sup>7</sup> *Wolford v. Powers*, 85 Ind. 294; *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. Rep. 87.

<sup>8</sup> *Traver v. —*, 1 Sid. 57; *Chick v. Trevett*, 20 Me. 462; *Fisher v. Bartlett*, 8 Greenl. (Me.) 122; *Hind v. Holdship*, 2 Watts (Pa.) 104; *Glasgow v. Hobbs*, 32 Ind. 440; *Cates v. Bales*, 78 Ind. 285; *Forster v. Fuller*, 6 Mass. 58; *Doyle v. Dixon*, 97 Mass. 206; *Cobb v. Cowdery*, 40 Vt. 25; *Hall Manuf'g Co. v. Supply Co.*, 48 Mich. 331, 12 N. W. Rep. 205; *Hilton v. Southwick*, 17 Me. 303; *Hannan v. Towers*, 3 Har. & J. (Md.) 151.



court, "had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave."<sup>9</sup> On this principle, the refraining by a person from the use of liquor and tobacco for a certain time at the request of another has been held a sufficient consideration for a promise by the latter to pay him a sum of money.<sup>10</sup> In this case the promisee is probably even benefited in performing his part of the agreement, and the promisor may not receive any benefit. The promisee, however, gives up a right, and that is enough. So, also, where a person traveled for his own pleasure and benefit at the request of another, this was held sufficient to support a promise by the latter to reimburse him for his expenses;<sup>11</sup> and, where an executor forbore to act as such on his coexecutor's promise to divide commissions with him, the forbearance was held a consideration for the promise.<sup>12</sup>

It has even been held that the liability incurred in purchasing property upon the faith of a promise made by another to contribute a certain sum in part payment of the price is a sufficient consideration to make the promise binding;<sup>13</sup> and where a person agreed to contribute a sum of money for the purpose of discharging a mortgage on church property, on condition that the church would raise the balance by voluntary subscription, and the church, through the pastor as its agent, promised to and did make the effort and perform the condition, it was held that the promise became binding, and that a note given in fulfillment thereof was based on a sufficient consideration.<sup>14</sup>

Like any other simple contract, a guaranty or a promise to pay

<sup>9</sup> *Bainbridge v. Firmstone*, 8 Adol. & El. 743.

<sup>10</sup> *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. Rep. 256; *Talbott v. Stemmons*, 89 Ky. 222, 12 S. W. Rep. 297; *Lindell v. Rokes*, 60 Mo. 249.

<sup>11</sup> *Devecmon v. Shaw*, 69 Md. 199, 14 Atl. Rep. 464.

<sup>12</sup> *Ohlendorff v. Kanne*, 66 Md. 495, 8 Atl. Rep. 351. See, also, *John v. John*, 122 Pa. St. 107, 15 Atl. Rep. 675.

<sup>13</sup> *Steele v. Steele*, 75 Md. 477, 23 Atl. Rep. 959; *Skidmore v. Bradford*, L. R. 8 Eq. 134.

<sup>14</sup> *Roberts v. Cobb*, 108 N. Y. 600, 9 N. E. Rep. 500.

another's debt must be supported by a consideration,<sup>15</sup> but the guarantor or promisor need not receive any benefit so long as the promisee has suffered a detriment, or forbore to exercise a right. Where a note, for instance, executed for a valuable consideration, is, before its delivery to the payee, guaranteed by a third person, the consideration from the payee to the makers is sufficient to support the guaranty.<sup>16</sup> So, also, the discharge of a debtor by his creditor, either from liability for the debt<sup>17</sup> or from lawful imprisonment for the debt,<sup>18</sup> is a consideration for a promise by a third person to pay the debt. Even forbearance to sue, or extension of the time for the payment of a debt, will support a third person's promise to pay or guaranty it.<sup>19</sup> So, where a new bond was given as a substitute for an old one, the surrender of the old bond was held a consideration for the new bond, and for the guaranty of a third person indorsed on it.<sup>20</sup>

Marriage is a valuable consideration for a promise,<sup>21</sup> and mutual promises to marry are a consideration each for the other.<sup>22</sup>

*Distinguished from Motive, and from "Good" Consideration.*

Consideration must not be confounded with motive. They are not the same thing.<sup>23</sup> Consideration means something which is of

<sup>15</sup> Post, p. 153, note 30.

<sup>16</sup> Winans v. Manufacturing Co., 48 Kan. 777, 30 Pac. Rep. 163. And see Heyman v. Dooley, 77 Md. 162, 26 Atl. Rep. 117.

<sup>17</sup> Whitney v. Clary, 145 Mass. 156, 13 N. E. Rep. 393; Carpenter v. Page, 144 Mass. 315, 10 N. E. Rep. 853.

<sup>18</sup> Smith v. Montelith, 13 Mees. & W. 427. It is otherwise if the arrest is unlawful. Post, p. 176.

<sup>19</sup> Bank of New Hanover v. Bridgers, 98 N. C. 67, 3 S. E. Rep. 826. See, also, post, p. 172.

<sup>20</sup> Erie Co. Sav. Bank v. Colt, 104 N. Y. 532, 11 N. E. Rep. 54. See post, p. 173.

<sup>21</sup> Shadwell v. Shadwell, 9 O. B. (N. S.) 159; Willard v. Stone, 7 Cow. (N. Y.) 22; Wright v. Wright, 54 N. Y. 437; Peck v. Vandemark, 99 N. Y. 29, 1 N. E. Rep. 41; Chichester v. Vass, 1 Munf. (Va.) 98; Dugan v. Gittings, 3 Gill (Md.) 138; Gurvin v. Cromatie, 11 Ired. Law (N. C.) 174; Rockafellow v. Newcomb, 57 Ill. 191; Frank's Appeal, 59 Pa. St. 194. Release from promise to marry is sufficient. Snell v. Bray, 56 Wis. 156, 14 N. W. Rep. 14.

<sup>22</sup> Post, p. 165.

<sup>23</sup> Thomas v. Thomas, 2 Q. B. 851; Philpot v. Gruninger, 14 Wall. 570.

some value in the eye of the law,—something which the law can recognize. The consideration for a promise is generally the motive for giving it, but there may be other motives, and there are motives which the law cannot recognize as consideration. A person may give a promise merely because he wishes to confer a benefit upon the promisee. His motive may be natural affection, or a sense of moral obligation, or gratitude for some past benefit conferred upon him by the promisee; but the law cannot attach any value to these feelings, and, as we shall presently see more at length, it does not regard them as a consideration for the promises which they prompt.<sup>24</sup>

Natural affection for a near relative, such as the affection of a parent for a child, is said to be a “good” consideration, and is sufficient to support a conveyance or a gift,<sup>25</sup> except as against the grantor’s or donor’s creditors, or bona fide purchasers;<sup>26</sup> but it is not sufficient to support a promise. The law requires a “valuable” consideration in executory contracts.<sup>27</sup>

#### *Request of Promisor.*

For the reasons explained in treating of offer and acceptance, the benefit must be conferred, or the detriment suffered, at the express or implied request of the promisor. A detriment suffered, or benefit conferred, for instance, in reliance on a promise previously made without consideration, but not suffered or conferred at the ex-

<sup>24</sup> Post, pp. 179, 180.

<sup>25</sup> *Stovall v. Barnett*, 4 Litt. (Ky.) 208; *M’Intire v. Hughes*, 4 Bibb (Ky.) 180; *Oliphant v. Leversidge*, 142 Ill. 160, 27 N. E. Rep. 921, and 30 N. E. Rep. 334; *Hanson v. Buckner*, 4 Dana (Ky.) 251; *Beith v. Beith*, 76 Iowa, 601, 41 N. W. Rep. 371; *Bell v. Scammon*, 15 N. H. 381; *Stafford v. Stafford*, 41 Tex. 111; *Jackson v. Sebring*, 16 Johns. (N. Y.) 515.

<sup>26</sup> *Read v. Mosby*, 87 Tenn. 759, 11 S. W. Rep. 940; *Snyder v. Free*, 114 Mo. 300, 21 S. W. Rep. 847; *De Lancey v. Stearns*, 66 N. Y. 157.

<sup>27</sup> Chit. Cont. 27. Post, p. 179. “A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favor of creditors and bona fide purchasers.” 2 Bl. Comm. 297.

press or implied request of the promisor, will not constitute a consideration for the promise.<sup>28</sup>

### NECESSITY FOR CONSIDERATION, AND PRESUMPTION.

**66. NECESSITY**—A valuable consideration is essential to the validity of every simple contract. This includes simple contracts required by the statute of frauds or otherwise to be in writing; except that—

**EXCEPTION**—Want of consideration does not avoid a negotiable instrument in the hands of a bona fide purchaser for value.

**67. Contracts under seal**, at common law, require no consideration, but this has been changed by statute in most jurisdictions.

**68. PRESUMPTION** — Negotiable instruments are by the law merchant, presumptive evidence of a consideration; and by statute in most jurisdictions the same is true of all other simple contracts in writing, and of contracts under seal in those jurisdictions where the common-law effect of a seal has been abolished.

Consideration is the universal requisite of all contracts not under seal, except the so-called "contracts of record," which, like contracts under seal, derive their validity from their form alone.<sup>29</sup> The rule applies to all simple contracts.<sup>30</sup> As we have seen, those contracts

<sup>28</sup> *Handrahan v. O'Regan*, 45 Iowa, 298. Ante, p. 30. Post, p. 197.

<sup>29</sup> *Rann v. Hughes*, 7 Term R. 346; *Cooke v. Oxley*, 3 Term R. 653; *Burnett v. Bisco*, 4 Johns. (N. Y.) 235; *Doebler v. Waters*, 30 Ga. 344; *Lowe v. Bryant*, 82 Ga. 235; *Oullahan v. Baldwin*, 100 Cal. 648, 35 Pac. Rep. 310; *Branson v. Kitchenman*, 148 Pa. St. 541, 24 Atl. Rep. 61; *McLean v. McBean*, 74 Ill. 134; *Baer v. Christian*, 83 Ga. 322, 9 S. E. Rep. 790; *Bailey v. Walker*, 29 Mo. 407; *Hendy v. Kler*, 59 Cal. 138; *Culver v. Banning*, 19 Minn. 308 (Gil. 200); *In re James' Estate* (Sup.) 28 N. Y. Supp. 992.

<sup>30</sup> The guaranty of another's debt must be supported by a consideration. In these contracts there are two considerations,—a consideration for the original contract, and a consideration for the guaranty. See *Briggs v. Latham*, 36 Kan. 205, 13 Pac. Rep. 120. If, however, as we have seen, a note, for instance, is guarantied by a third person before its delivery to the payee, the •

which are not under seal, nor of record, but which are required to be in writing, either by the statute of frauds, or by other statutes, or by the common law, are simple contracts, notwithstanding the written form, and consideration is as essential to their validity as it is to the validity of simple oral contracts. A promissory note or bill of exchange, or a written acceptance of an order for the payment of money, needs a consideration to support it. The fact that a promise to answer for another's debt, or a promise by an administrator or executor to answer damages out of his own estate, or a promise not to be performed within a year, or an agreement relating to land, or in consideration of marriage, or for the sale of goods, is in writing as required by the statute of frauds, does not render it any the less a simple contract, nor dispense with the necessity of a consideration. It was at one time doubted whether a promise not under seal needed a consideration if it was put in writing,<sup>11</sup> but the necessity for a consideration was affirmed and settled in England in 1778 in a suit against an administratrix who, without consideration, had promised in writing to answer damages out of her own estate. It was contended that the writing required by the statute of frauds rendered consideration unnecessary, but the contrary was held. "It is undoubtedly true," it was said, "that every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such agreement is '*nudum pactum ex quo non oritur actio*;' and, whatever may be the sense of this maxim in the civil law, it is in the last sense only that it is to be understood in our law. \* \* \* All contracts are, by the law of England, distinguished into agreements by specialty, and agree-

consideration from the payee to the maker is sufficient to support the guaranty as well as the note. *Winans v. Manufacturing Co.*, 48 Kan. 777, 30 Pac. Rep. 163; *Heyman v. Dooley*, 77 Md. 162, 26 Atl. Rep. 117. No action lies on a gratuitous promise to perform services, as, for instance, to obtain insurance on the property of the promisee, though the promisee relies on it, and is injured by its nonperformance; but, if the gratuitous promisor undertakes to do what he promised, he will be liable for doing it negligently. *Thorne v Deas*, 4 Johns. (N. Y.) 84; post, p. 714.

<sup>11</sup> *Pillans v. Van Mierop* (A. D. 1765) 3 Burrows, 1663.

ments by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved."<sup>22</sup>

*Negotiable Instruments.*

Negotiable bills of exchange and promissory notes are an apparent, but not a real, exception to this rule. In contracts of this nature consideration is essential, but it is presumed to exist, and need not be proved by the plaintiff.<sup>23</sup> The burden of proving want of consideration is on the party disputing the validity of the contract, but, if he can show that, as between himself and the party suing, no consideration was given for the making or indorsement of the bill or note, the promise fails, just as it would in case of any other simple contract under like circumstances.<sup>24</sup> Want of consideration, however, cannot be shown as against a purchaser of the instrument for value before maturity, and without notice that there was no consideration.<sup>25</sup>

*Statutory Presumption of Consideration.*

In some states, statutes have been enacted declaring that all written instruments shall be presumptive evidence of a consideration, rebuttable, however, by showing that there was in fact no consideration, thereby putting all simple contracts in writing, to this extent, on a level with negotiable instruments.<sup>26</sup>

<sup>22</sup> *Rann v. Hughes*, 7 Term R. 350; *Cook v. Bradley*, 7 Conn. 57; *In re Hess' Estate*, 150 Pa. St. 348, 24 Atl. Rep. 676; *Brown v. Adams*, 1 Stew. (Ala.) 51; *Burnett v. Bischo*, 4 Johns. (N. Y.) 235; *Perrine v. Cheeseman*, 11 N. J. Law, 174; *Train v. Gold*, 5 Pick. (Mass.) 380; *Eddy v. Roberts*, 17 Ill. 505.

<sup>23</sup> *Townsend v. Derby*, 3 Metc. (Mass.) 363; *Underhill v. Phillips*, 10 Hun (N. Y.) 591; *Kimball v. Huntingdon*, 10 Wend. (N. Y.) 675; *Stacker v. Hewitt*, 1 Scam. (Ill.) 207; *Mitchell v. Sheldon*, 2 Blackf. (Ind.) 185.

<sup>24</sup> *Fowler v. Shearer*, 7 Mass. 14; *Schoonmaker v. Roosa*, 17 Johns. (N. Y.) 301; *Pearson v. Pearson*, 7 Johns. (N. Y.) 26; *Winter v. Livingston*, 13 Johns. (N. Y.) 54; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. Rep. 463; *Norton, Bills & N.* 135 et seq.

<sup>25</sup> *Norton, Bills & N.* 245; *Murray v. Lardner*, 2 Wall. 110.

<sup>26</sup> There are such statutes in California, Indiana, Iowa, Kansas, Kentucky, Missouri, and possibly in other states.

*Contracts under Seal.*

We have seen that at common law consideration is not necessary to the validity of a contract under seal; that such contracts derive their validity from their form alone. We have also called attention to the statutory modifications of this rule, and shown that in some states all distinction between sealed and unsealed instruments, in so far as regards consideration, has been abolished.<sup>17</sup>

**FROM WHOM CONSIDERATION MUST MOVE.**

69. In England, and in a few of our states, and in the federal courts, it is held that a person for whose benefit a promise is made, but who is not a party to the contract, cannot sue the promisor; in other words, that the consideration must move from the plaintiff. There are exceptions to this rule—

**EXCEPTIONS—**(a) Where, under a contract between two persons, assets have come to the promisor's hands, or under his control, which in equity belong to a third person; in which case the latter may sue.

(b) There is an apparent exception where the promisee is acting as agent for another, but this is unknown to the promisor. The principal, being the real party to the contract, may sue.

70. In most of our states this doctrine is either not recognized, or else is changed by statutes allowing suit to be brought by the real party in interest.

In England, and in a very few of our states, and in the federal courts, it is held that the consideration for the promise must move from the plaintiff, which is equivalent to saying that when a man sues upon a promise he must show that the consideration for which the promise was made was some benefit conferred or detriment sustained by himself; in other words, that strangers do not acquire a right to sue upon it because they happen to be interested in its per-

<sup>17</sup>Ante, p. 72.

formance.<sup>38</sup> "The general rule of law," it was said by the Massachusetts court, "is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and, consequently, that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter."<sup>39</sup>

*Exceptions to the Rule.*

As will presently be shown, this rule is not in force in some of our states. Even in those jurisdictions in which it is still recognized there are several exceptions to it. One of these exceptions, and by far the most frequent one,<sup>40</sup> is where, under a contract between two persons, assets have come to the promisor's hands, or under his control, which in equity belong to a third person, or, as it has been said, "those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly or by implication, from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors."<sup>41</sup> In such a case it is held that the third person may sue in his own name,<sup>42</sup> though the suit is founded rather on the implied undertaking which the law raises from the possession of the assets, than on the express promise.<sup>43</sup>

<sup>38</sup> *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123; *Exchange Bank v. Rice*, 107 Mass. 37; *Wheeler v. Stewart*, 94 Mich. 445, 54 N. W. Rep. 172; *Linne-man v. Moross* (Mich.) 57 N. W. Rep. 103; *Edwards v. Clement*, 81 Mich. 513, 45 N. W. Rep. 1107; *Woodland v. Newhall*, 81 Fed. Rep. 434; *Price v. Easton*, 4 Barn. & Adol. 433; *Thomas v. Thomas*, 2 Q. B. 851; *Bourne v. Mason*, 1 Vent. 6; *Crow v. Rogers*, 1 Strange, 592; *Adams v. Kuehn*, 119 Pa. St. 76, 13 Atl. Rep. 184; *Wilbur v. Wilbur*, 17 R. I. 295, 21 Atl. Rep. 497. But see *Hendrick v. Lindsay*, 93 U. S. 143. Contract under seal. *Cock v. Varney*, 45 N. J. Eq. 72, 17 Atl. Rep. 108. See, also, post, p. 513.

<sup>39</sup> *Exchange Bank v. Rice*, 107 Mass. 37.

<sup>40</sup> *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123.

<sup>41</sup> *Exchange Bank v. Rice*, 107 Mass. 37.

<sup>42</sup> *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Putnam v. Field*, 103 Mass. 556; *Grim v. Thomas Iron Co.*, 115 Pa. St. 611, 8 Atl. Rep. 595.

<sup>43</sup> *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123.



The early cases made another exception in cases where a promise was made to a father for the benefit of his son, on the ground that by reason of the near relationship between parent and child the latter might be thought to have an interest in the consideration and the contract, and the former to have entered into the contract as his agent; "but this is no longer the law in England," nor, probably, in this country.<sup>40</sup>

An apparent exception to the rule is where the promisee is in fact acting as the agent of a third person, but this is unknown to the promisor. The principal in these cases is the real party to the contract, and may therefore sue in his own name on the promise made to his agent.<sup>41</sup>

The rule which we have been discussing must be distinguished from the rule in the case of a novation; that is, where a debtor and his creditor and a third person enter into an agreement by which the third person is to pay the debt to the creditor, and the debtor is to be released. In this case the creditor is a party to the contract, and may, therefore, sue the third person on his promise. Where the promise is made by the third person to the debtor, and the creditor is not a party to the agreement, the latter cannot sue.<sup>42</sup>

*The General Rule in This Country.*

Most of our courts refuse to recognize the rule that a person for whose benefit a promise is made cannot sue the promisor. In a

<sup>40</sup> *Dutton v. Poole*, 2 Lev. 210; *Felton v. Dickinson*, 10 Mass. 287.

<sup>41</sup> *Tweddle v. Atkinson*, 1 Best & S. 393; *Marston v. Bigelow*, 150 Mass. 53, 22 N. E. Rep. 71.

<sup>42</sup> *Exchange Bank v. Rice*, 107 Mass. 37; *Wilbur v. Wilbur*, 17 R. I. 295, 21 Atl. Rep. 497.

<sup>43</sup> *Sims v. Bond*, 5 Barn. & Adol. 389; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Barry v. Page*, 10 Gray (Mass.) 398; *Hunter v. Giddings*, 97 Mass. 41; *Ford v. Williams*, 21 How. 287.

<sup>44</sup> *Borden v. Boardman*, 157 Mass. 410, 32 N. E. Rep. 469. "Where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and, if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue." *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123.

leading New York case a debtor of the plaintiff had loaned the defendant a sum of money, and the defendant had promised him to pay the plaintiff. The plaintiff was not a party to the contract, but it was held by four of the seven judges that he could sue on the promise, as it was settled in that state that, where a promise is "made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach."<sup>40</sup> And to the same effect are the decisions in other states.<sup>41</sup> But even in the states where this doctrine is recognized, there must be between the promisee and the third person seeking to enforce the promise the relation of debtor and creditor, or such a relation as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the promisee to such third person. "It is not sufficient that the performance of the promise may benefit the third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance, and so within the contemplation of the parties, and, in addition, the promisee must have a legal interest that the promise be performed in favor of the party claiming performance."<sup>42</sup>

<sup>40</sup> *Lawrence v. Fox*, 20 N. Y. 268. In this case one of the other three judges dissented, and the other two based their concurrence in the judgment on the ground that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto. See, also, *Schermerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 140; *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. Rep. 756; *Burr v. Beers*, 24 N. Y. 178; *Stewart v. Trustees*, 2 Denio (N. Y.) 403; *Reynolds v. Lawton*, 62 Hun, 596, 17 N. Y. Supp. 432; *Cook v. Berrott*, 66 Hun, 633, 21 N. Y. Supp. 358; *Riordan v. First Presbyterian Church*, 3 Misc. Rep. 553, 23 N. Y. Supp. 323, 26 N. Y. Supp. 38.

<sup>41</sup> *McDowell v. Laev*, 35 Wis. 181; *Bassett v. Hughes*, 43 Wis. 319; *Bristow v. Lane*, 21 Ill. 194; *Harms v. McCormick*, 132 Ill. 104, 22 N. E. Rep. 511; *Mason v. Hall*, 30 Ala. 599; *Brice v. King*, 1 Head (Tenn.) 152; *Allen v. Thomas*, 3 Metc. (Ky.) 198; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. Rep. 427; *Bohanan v. Pope*, 42 Me. 93; *Wright v. Terry*, 23 Fla. 160, 2 South. Rep. 6; *Crampton v. Ballard*, 10 Vt. 251; *First Nat. Bank v. Schussler* (Ky.) 2 S. W. Rep. 145; *Coleman v. Whitney*, 62 Vt. 123, 20 Atl. Rep. 322; *Kaufman v. Bank*, 31 Neb. 661, 48 N. W. Rep. 738; *Lovejoy v. Howe* (Minn.) 57 N. W. Rep. 57; *Maxfield v. Schwartz*, 43 Minn. 221, 45 N. W. Rep. 429; *Barnes v. Insurance Co.* (Minn.) 57 N. W. Rep. 314; *Barnett v. Pratt* (Neb.) 55 N. W. Rep. 1050; *Shamp v. Meyer*, 20 Neb. 223, 29 N. W. Rep. 379.

<sup>42</sup> *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. Rep. 49. And see *Jefferson v.*

In some states it is held that the doctrine as held by the New York court applies as well to covenants or promises under seal as to simple contracts;<sup>52</sup> but in other states the contrary has been held.<sup>53</sup>

In most states there are statutes expressly providing that suit may be brought on a promise by the real party in interest in his own name.

### ADEQUACY OF CONSIDERATION.

71. So long as there is some real consideration, the courts will not inquire whether it is adequate to the promise, except—

**EXCEPTIONS**—(a) Where there is a mere exchange of money, or, perhaps, of other things, the value of which is conclusively fixed by law.

(b) Inadequacy of consideration will be taken into account in equity; for instance:

- (1) In suits for specific performance of contracts;
- (2) In suits to reform contracts on the ground of mistake; and
- (3) In suits for relief from contracts on the ground of fraud and undue influence.

At law the benefit conferred or detriment suffered by the promisee in exchange for the promise need not be equal to the responsibility assumed by the promisor; or, in other words, the consideration need not be adequate. Any real consideration, however small, will support a promise. So long as a man gets what he has bargained for, and it is of some value in the eye of the law, the courts

Asch, 53 Minn. 446, 55 N. W. Rep. 604. See, also,—as limiting the effect of *Lawrence v. Fox*, *supra*,—*Lorillard v. Clyde*, 122 N. Y. 502, 25 N. E. Rep. 917; *Wheat v. Rice*, 97 N. Y. 302; *Clark v. Howard*, 26 N. Y. Supp. 620; *O'Neil v. Ice Co.*, 26 N. Y. Supp. 598.

<sup>52</sup> *Bassett v. Hughes*, 43 Wis. 319. And see *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. Rep. 756; *Coster v. City of Albany*, 43 N. Y. 399; *Riordan v. First Presb. Church*, 26 N. Y. Supp. 38.

<sup>53</sup> *Harms v. McCormick*, 132 Ill. 104, 22 N. E. Rep. 511, reversing 30 Ill. App. 125. And see *Cock v. Varney*, 45 N. J. Eq. 72, 17 Atl. Rep. 168.

will not ask what its value may be to him, or whether its value is in any way proportionate to his act or promise given in return, for this would be "the law making the bargain instead of leaving the parties to make it."<sup>54</sup> In a case in the supreme court of the United States, Mr. Justice Story said, in speaking of a guaranty of another's debt, made in consideration of one dollar: "A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract. \* \* \* A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid."<sup>55</sup>

Forbearance by a creditor, for instance, to levy an execution on the debtor's property, will support a promise by the debtor or by a third person to pay a larger sum than could have been recovered under the execution. "If," said Lord Tenterden in such a case, "the inconvenience of an execution against these goods at the time in question was so great that the defendant thought proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise."<sup>56</sup>

The rule, then, is that the courts will not determine the value of things given or promised; that they can determine whether they are of any value in law, but beyond that they will not go. In an often-cited, though possibly a doubtful, case on this subject, the defendant had made the promise sued upon in consideration of the plaintiffs' surrender of a guaranty which had been given by the defendant, but which turned out to have been unenforceable because it was within the statute of frauds. The surrender, how-

<sup>54</sup> *Pilkington v. Scott*, 15 Mees. & W. 660; *Worth v. Case*, 42 N. Y. 362; *Judy v. Louderman*, 48 Ohio St. 502, 29 N. E. Rep. 181; *Hubbard v. Coolidge*, 1 Metc. (Mass.) 84; *Brooks v. Ball*, 18 Johns. (N. Y.) 337; *Nash v. Lull*, 102 Mass. 60; *Earl v. Peck*, 64 N. Y. 596; *Dorwin v. Smith*, 35 Vt. 69; *Newhall v. Paige*, 10 Gray (Mass.) 366; *Boggs v. Wann*, 58 Fed. Rep. 681; *Taylor v. Turley*, 33 Md., at page 505; *McArtee v. Engart*, 13 Ill. 242; *Eyre v. Potter*, 15 How. 42; *Grandin v. Grandin*, 49 N. J. Law, 508, 9 Atl. Rep. 756; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. Rep. 956; *Byrne v. Cummings*, 41 Miss. 192; *Diefendorf v. Diefendorf*, 56 Hun, 639, 8 N. Y. Supp. 617.

<sup>55</sup> *Lawrence v. McCalmont*, 2 How. 426. And see, to same effect, *Appeal of Ferguson*, 117 Pa. St. 426, 11 Atl. Rep. 885.

<sup>56</sup> *Smith v. Algar*, 1 Barn. & Adol. 603.

ever, was held a sufficient consideration for the promise. "Whether or no the guaranty could have been available," said the court, "the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free, and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other motives and objects, and of their weight he was the only judge."<sup>47</sup>

We have seen, in discussing contracts under seal, that want of consideration may be shown notwithstanding the seal, where the contract is in partial restraint of trade. The fact, however, that a contract is in partial restraint of trade forms no exception to the doctrine that adequacy of consideration cannot be inquired into.<sup>48</sup>

*Exception in Exchange of Fixed Values.*

The doctrine that courts of law will not inquire into the adequacy of consideration is based on their inability to determine what value the parties may have attached to a thing given or promised, and it does not apply to an exchange of things the value of which is exactly and conclusively fixed by law.<sup>49</sup> In an Indiana case on this point

<sup>47</sup> *Haigh v. Brooks*, 10 Adol. & El. 309. And see *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. Rep. 181; *Churchill v. Bradley*, 58 Vt. 403, 5 Atl. 189; *Sykes v. Chadwick*, 18 Wall. 141. The case of *Haigh v. Brooks*, supra, is a doubtful one in the extent to which it goes. Adequacy of consideration will not be inquired into, but there must be some real consideration. It must be remembered that motive is not consideration. The case seems to overlook this fact. The case might be supported on the ground that the plaintiffs had a right to keep the guaranty, whether it was enforceable or not, though this even is doubtful. We shall presently see that forbearance to try and enforce a claim which is clearly unenforceable is no consideration for a promise. Post, p. 175.

<sup>48</sup> *Guerand v. Dandeleit*, 32 Md. 561; *Pierce v. Fuller*, 8 Mass. 223; *McClung's Appeal*, 58 Pa. St. 51; *Hubbard v. Miller*, 27 Mich. 15; *Duffy v. Shockey*, 11 Ind. 70; *Linn v. Sigsbee*, 67 Ill. 75; *Grasselli v. Lowden*, 11 Ohio St. 349; *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641.

<sup>49</sup> *Langd. Cont.* 70; *Schnell v. Nell*, 17 Ind. 29; *Shepard v. Rhodes*, 7 R. I. 470; *Brooks v. Ball*, 18 Johns. (N. Y.) 337.

the defendant had promised to pay the plaintiff and others \$600 in consideration of a promise by them to pay him one cent, and the consideration was held inadequate. "It is true," said the court, "that, as a general proposition, inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money—of coin—whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or perhaps for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay \$600 for one cent, even had the portion of the cent due from the plaintiff been tendered, is an unconscionable contract, void at first blush upon its face, if it be regarded as an earnest one." <sup>60</sup>

#### *In Equity.*

Though the adequacy of the consideration for a contract will not be considered in courts of law, it is otherwise under some circumstances in equity. Inadequacy of consideration will be taken into account to some extent by courts of equity in the exercise of their peculiar power to compel specific performance of contracts, to reform them and correct mistakes, or to cancel and set them aside on the ground of fraud and undue influence. It has been held that inadequacy of consideration, without more, is ground upon which specific performance may be resisted; but the better doctrine requires that there shall be such gross inadequacy as to shock the conscience, and amount in itself to evidence of fraud.<sup>61</sup>

The same doctrine applies where a court of equity is asked to reform a written contract on the ground of mistake. If a contract

<sup>60</sup> *Schnell v. Nell*, 17 Ind. 29.

<sup>61</sup> *Coles v. Trecothick*, 9 Ves. 234; *Wollums v. Horsley* (Ky.) 20 S. W. Rep. 781; *Cathcart v. Robinson*, 5 Pet. 264; *Erwin v. Parham*, 12 How. 197; *Waterman v. Waterman*, 27 Fed. Rep. 827; *Harrison v. Town*, 17 Mo. 237; *Conrad v. Schwamb*, 53 Wis. 378, 10 N. W. Rep. 395; *Gasque v. Small*, 2 Strob. Eq. (S. C.) 72; *Ready v. Noakes*, 29 N. J. Eq. 497; *Shaddle v. Disborough*, 30 N. J. Eq. 370; *Conaway v. Sweeny*, 24 W. Va. 643; *Galloway v. Barr*, 12 Ohio, 355. In some states an adequate consideration is required by statute. *Morrill v. Everson*, 77 Cal. 114, 19 Pac. Rep. 190.

is sought to be avoided on the ground of fraud or undue influence, the consideration may be inquired into, and inadequacy of consideration will be regarded as corroborative evidence in support of the suit;<sup>62</sup> but mere inadequacy of consideration alone is not enough to warrant the court's interference.<sup>63</sup>

### SUFFICIENCY OR REALITY OF CONSIDERATION.

**72.** Though the consideration need not be adequate to the promise, it must not be illusory or unreal; some real benefit must be conferred on the promisor, or some real detriment suffered by the promisee.

Although, as we have seen, courts of law will not inquire into the adequacy of consideration, they will insist that it shall not be illusory or unreal. To understand what the law regards as a real and what as an unreal consideration, it will be well to inquire into the various forms which consideration may assume, and to note the grounds upon which certain alleged considerations have been held to be of no real value in the eye of the law. Strictly speaking, what we call an "unreal consideration" is no consideration at all, but this use of the term cannot well mislead.

<sup>62</sup> *Gifford v. Thorn*, 9 N. J. Eq. 702; *Talbott v. Hooser*, 12 Bush (Ky.) 408; *Davidson v. Little*, 22 Pa. St. 245; *McMullen v. Gable*, 47 Ill. 67; *White v. Flora*, 2 Tenn. 426; *Hough v. Hunt*, 2 Ohio, 495; *Green v. Thompson*, 2 Ired. Eq. (N. C.) 365; *Haines v. Haines*, 6 Md. 435; *Grindrod v. Wolf*, 38 Kan. 292, 16 Pac. Rep. 691; *Howard v. Howard*, 87 Ky. 616, 9 S. W. Rep. 411; *Hunter v. Owen* (Ky.) 9 S. W. Rep. 717; *Bowman v. Patrick*, 36 Fed. Rep. 138; *Cofer v. Moore*, 87 Ala. 705, 6 South. Rep. 306; *Hick v. Thomas*, 90 Cal. 289, 27 Pac. Rep. 208, 376; *Burke v. Taylor*, 94 Ala. 530, 10 South. Rep. 129.

<sup>63</sup> *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. Rep. 9; *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125; *Davidson v. Little*, 22 Pa. St. 245; *Jones v. Degge*, 84 Va. 685, 5 S. E. Rep. 799; *McArfee v. Engart*, 13 Ill. 242; *Dent v. Ferguson*, 132 U. S. 50, 10 Sup. Ct. Rep. 13; *Korne v. Korne*, 30 W. Va. 1, 3 S. E. Rep. 17; *Herron v. Herron*, 71 Iowa, 428, 32 N. W. Rep. 407; *Matthews v. Crockett*, 82 Va. 394; *Berry v. Hall*, 105 N. C. 154, 10 S. E. Rep. 903; *Brockway v. Harrington*, 82 Iowa, 23, 47 N. W. Rep. 1013; *Miles v. Iron Co.*, 125 N. Y. 294, 26 N. E. Rep. 261; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. Rep. 804. And see the cases cited in the preceding note.

*Forms of Consideration.*

The consideration for a promise may be an act or a forbearance, or a promise to do or forbear. When a promise is given for a promise, the contract is said to be made upon an executory consideration. The obligations created by it rest equally upon both parties, each being bound to a future act. An example is in case of mutual promises to marry, in which the consideration for the promise of each is the promise of the other. When the consideration for a promise is an act or forbearance, the contract is said to be made upon a consideration executed. This arises when either the offer or acceptance is signified by one of the parties doing all that he is bound to do under the contract so created.

A contract consisting of mutual promises, so that both parties are bound to some future act or forbearance, is said to be bilateral. A contract in which the offer or acceptance is signified by one of the parties doing all he is required to do under the agreement, leaving outstanding obligations on the other party only, is said to be unilateral.

**SAME—MUTUAL PROMISES—MUTUALITY.**

73. A promise is a sufficient consideration for a promise, if the act or forbearance promised would be a consideration.

74. The promises must be concurrent.

75. The promise may be contingent or conditional, except that—

**MUTUALITY**—Mutuality of engagement is necessary, and, if the condition or contingency produces want of mutuality, the consideration is insufficient. Both parties must be bound or neither is bound.

It is well settled that a promise is a sufficient consideration for a promise.<sup>64</sup> In the case of mutual promises to marry, the promise

<sup>64</sup> *Higgins v. Hill*, 56 Law T. R. (N. S.) 426; *Missisquoi Bank v. Sabin*, 48 Vt. 239; *Buckingham v. Ludlum*, 40 N. J. Eq. 422; *Phillips v. Preston*, 5 How.



of each party is a sufficient consideration for the promise of the other;<sup>66</sup> and so it is in any other case of mutual promises, provided, of course, the promises are to do something of value in the eye of the law. In other words, as a rule, a promise to do a thing is just as valuable a consideration as the actual doing of it would be. After a person had sold and conveyed land, the parties, differing as to the quantity of land embraced in the tract, made an agreement by which the land was to be surveyed, and the grantor should pay for any deficiency, while the grantee should pay for any excess over the acreage mentioned in the deed. It turned out that there was an excess, but the grantee, when sued on his promise to pay therefor, claimed that, as all the land was conveyed by the deed, his promise was without consideration. It was held, however, that the promise of the grantor to pay for any deficiency was a sufficient consideration.<sup>67</sup>

The promises, to constitute a consideration for each other, must be concurrent, or become obligatory at the same time; otherwise each will be without consideration at the time it is made, and both will therefore be *nuda pacta*.<sup>68</sup> Of course, if a promise is given without a consideration, its subsequent express or implied renewal, when a promise is given in return, would be equivalent to a new promise, and the promises would be concurrent.

278; *Funk v. Hough*, 29 Ill. 145; *Coleman v. Eyre*, 45 N. Y. 38; *Briggs v. Tillotson*, 8 Johns. (N. Y.) 304; *Baker v. Kansas City, St. J. & C. B. R. Co.*, 91 Mo. 152, 3 S. W. Rep. 486; *Porter v. Rose*, 12 Johns. (N. Y.) 209; *Strangborough and Warner's Case*, 4 Leon. 3; *Gower v. Capper*, Cro. Eliz. 543; *Nichols v. Raynbred*, Hob. 88; *Norris v. Tiffany*, 6 Misc. Rep. 380, 26 N. Y. Supp. 750. Promise to attend a person's funeral in return for promise by the latter to pay money. *Earle v. Angell*, 32 Mass. 294, 32 N. E. Rep. 164. Where two persons exchange their notes, each note is supported by the other. *Cohu v. Husson*, 57 N. Y. Super. Ct. 238, 6 N. Y. Supp. 897. Signing note as surety as consideration for conveyance. *Grigsby v. Schwarz*, 82 Cal. 278, 22 Pac. Rep. 1041. Promise of support. *Keener v. Keener*, 34 W. Va. 421, 12 S. E. Rep. 729; *Worthy v. Brady*, 91 N. C. 265, 108 N. C. 440, 12 S. E. Rep. 1034.

<sup>66</sup> *Harrison v. Cage*, 5 Mod. 411; *Holt v. Ward Clarencieux*, 2 Strange, 937.

<sup>67</sup> *Seward v. Mitchell*, 1 Cold. (Tenn.) 87; *Howe v. O'Malley*, 1 Murph. Eq. (N. C.) 287. It would be otherwise if there were no promise by the grantor. *Smith v. Ware*, 13 Johns. (N. Y.) 259.

<sup>68</sup> *Nichols v. Raynbred*, Hob. 88; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Tucker v. Woods*, Id. 190; *Buckingham v. Ludlum*, 40 N. J. Eq. 422.

As explained in treating of offer and acceptance, some time must necessarily elapse between an offer and its acceptance, and in some cases a considerable time may elapse. The offer, however, is considered as continuing during the time allowed for acceptance; and when it is accepted by the giving of a promise both promises become obligatory at the same time, or are concurrent.

*Voluntary Subscriptions.*

Voluntary subscriptions by a number of persons to promote some object in which they have a common interest—as, for instance, where a number of persons voluntarily promise to pay a certain sum each to found a college—have been said to furnish an illustration of mutual promises. Some courts have sustained them on the ground that the promise of each subscriber is the consideration for the promises of the others.<sup>68</sup> By the weight of authority, however, a gratuitous subscription cannot be upheld on the ground that it led others to subscribe. The promisee must have done something, or have incurred or assumed some liability or obligation, in reliance on the promise; otherwise there is neither a benefit to the promisor, nor loss, trouble, or inconvenience to, or charge or obligation resting upon, the promisee.<sup>69</sup>

<sup>68</sup> *Stewart v. Trustees*, 2 Denio (N. Y.) 408; *Higert v. Asbury University*, 53 Ind. 326 (collecting cases); *Underwood v. Waldron*, 12 Mich. 73; *Conrad v. La Rue*, 52 Mich. 83, 17 N. W. Rep. 706; *Lathrop v. Knapp*, 27 Wis. 214; *Culver v. Banning*, 19 Minn. 303 (Gil. 260); *Trustees of T. C. Academy v. Nelson*, 24 Vt. 189; *Christian College v. Hendley*, 49 Cal. 347.

<sup>69</sup> *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528; *Grand Lodge v. Farnham*, 70 Cal. 158, 11 Pac. Rep. 502; *Presbyterian Church v. Cooper*, 112 N. Y. 517, 20 N. E. Rep. 352; *Hamilton College v. Stewart*, 1 N. Y. 581; *Barnes v. Perrine*, 12 N. Y. 18; *Bohn Manuf'g Co. v. Lewis*, 45 Minn. 164, 47 N. W. Rep. 652; *Roberts v. Cobb*, 103 N. Y. 600, 9 N. E. Rep. 500; *Baptist Church v. Cornwell*, 117 N. Y. 601, 23 N. E. Rep. 177; *Broadbent v. Johnson*, 2 Idaho, 300, 13 Pac. Rep. 83; *La Fayette Co. M. Corp. v. Magoon*, 73 Wis. 621, 42 N. W. Rep. 17; *Friedline v. Board*, 23 Ill. App. 494; *Richelleu Hotel Co. v. Encampment Co.*, 140 Ill. 248, 29 N. E. Rep. 1044; *Kinsley v. Encampment Co.*, 41 Ill. App. 259; *Ohio, etc., College v. Love*, 16 Ohio St. 20; *Johnson v. Ollerwein University*, 41 Ohio St. 527; *Whitsitt v. Pre-emption P. Church*, 110 Ill. 125; *Prior v. Cain*, 25 Ill. 292; *McClure v. Wilson*, 43 Ill. 356; *Underwood v. Waldron*, 12 Mich. 73; *Barnett v. Franklin College* (Ind. App.) 37 N. E. Rep. 427. Under Pennsylvania statute in relation to charities. *Gans v. Reimensnyder*, 110 Pa. St. 17, 2 Atl. Rep. 425. Where three brothers agreed to contribute each a certain sum for the use of plain-

*Contingent and Conditional Promises—Mutuality—Options and Refusals.*

In bilateral contracts—that is, where the consideration for a promise is a promise—the whole agreement may be intended by the parties to be contingent, and to come into effect only at the will of one of the parties; as, for instance, where a person offers to supply at a certain price such goods as another may choose to order. Sir William Anson argues that such an agreement is binding on the promisor, on the ground that a sufficient consideration for his promise lies in the fact that, though the promisee is not bound to order any goods, yet, if he does order them, he is bound by the terms of the agreement as to price. It is well settled, however, both in England and with us, that such an agreement, so long as nothing is done by the promisee, is not binding on the promisor. Both parties must be bound or neither is bound; in other words, there must be mutuality of engagement.<sup>70</sup> A person, therefore, who promises to sell another land or goods, or to do something else, if the latter shall require it, may repudiate his agreement so long as nothing is done by the promisee to make the promise binding, for, until the promisee has either done or promised something in return for the promise, it is nudum pactum.<sup>71</sup>

In such a case, however, according to the better opinion, as we have seen in treating of offer and acceptance, the promisor is in the posi-

tion, and two of them paid their shares to the third, on the understanding that he should contribute a like sum, it was held that there was a sufficient consideration for the promise of the third, and he could not recede. *Hostetter v. Hollinger*, 117 Pa. St. 606, 12 Atl. Rep. 741.

<sup>70</sup> *Cooke v. Oxley*, 3 Term R. 653; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. Rep. 669; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Ewing v. Gordon*, 49 N. H. 444; *Burnett v. Bisco*, 4 Johns. (N. Y.) 235; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. Rep. 284; *McKinley v. Watkins*, 13 Ill. 140; *L'Amoureux v. Gould*, 7 N. Y. 349; *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. Rep. 139; *Thayer v. Burchard*, 90 Mass. 508; *Smith v. Weaver*, 90 Ill. 392; *Bean v. Burbank*, 16 Me. 458; *Mers v. Insurance Co.*, 68 Mo. 127; *Stembridge v. Stembridge's Adm'r*, 87 Ky. 91, 7 S. W. Rep. 611; *Shenandoah Val. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. Rep. 239; *Barker v. Critzer*, 35 Kan. 459, 11 Pac. Rep. 382; *Warren v. Costello*, 109 Mo. 338, 19 S. W. Rep. 20; *Graybill v. Brugh*, 89 Va. 895, 17 S. E. Rep. 558. See, also, cases cited, p. 50, note 71.

<sup>71</sup> Ante, pp. 50, 51, and cases cited.

tion of one who has made a continuing offer, which, though it may be withdrawn before anything is done by the promisee, will become binding when it is accepted by him, either by giving the contemplated promise in return, or by doing the acts contemplated. In giving the promise or otherwise supplying the consideration, he supplies the element of mutuality. If, therefore, a person promises to sell such goods as another may order, or to sell land if another shall choose to buy it, and before his offer is withdrawn the other orders goods, or agrees to buy the land, the promisor is bound to sell at the price named.<sup>12</sup> He cannot then refuse to sell on the ground that the promisee was not bound to buy. Some courts, however, hold that in such a case there is not a continuing offer, but an agreement void for want of mutuality, and that, if goods are ordered, for instance, the promisor is not bound to furnish them.\*

So, also, a promise, though a mere nudum pactum when made, because the promisee is not bound, may become binding on his afterwards furnishing the consideration contemplated by doing what he was expected to do, but had not promised to do. "The proposition," it was said in a New York case, "is stated by Chitty as broadly as the defendant's counsel claims it, that if the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality; but the proposition is too broadly stated. It is confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise. For there are many valid contracts not mutually binding at the time when made; as, when A. says to B., 'If you will furnish goods to C., I will pay for them,' B. is not bound to furnish

<sup>12</sup> *G. N. Railway Co. v. Witham*, L. R. 9 C. P. 16; *Johnston v. Trippe*, 33 Fed. Rep. 530; *Moses v. McClain*, 82 Ala. 370, 2 South. Rep. 741; *Wisconsin, I. & N. Ry. Co. v. Braham*, 71 Iowa, 484, 32 N. W. Rep. 382; *Davis v. Robert*, 89 Ala. 402, 8 South. Rep. 114; *Ross v. Parks*, 93 Ala. 153, 8 South. Rep. 368; *Thayer v. Burchard*, 99 Mass. 508; *Cooper v. Wheel Co.*, 94 Mich. 272, 54 N. W. Rep. 39. Filing of bill by vendee for specific performance has been held to supply mutuality. *Dynan v. McColloch*, 46 N. J. Eq. 11, 18 Atl. Rep. 822. But most of the cases are to the contrary. See cases cited ante, note 70.

\**Campbell v. Lambert*, 36 La. Ann. 35; *Rafolovitz v. American Tobacco Co.*, 73 Hun, 87, 25 N. Y. Supp. 1036.

them, but, if he does, he may recover on the promise.”<sup>73</sup> The offer of the promise is accepted by furnishing the consideration which supports it; or, as we have said, the contract is formed by one of the parties doing what he is expected to do. An offer of a reward to the public generally for the performance of certain services, for instance, is not binding when it is made; but when an individual performs the services he accepts the offer, and in doing so furnishes the consideration which renders the promise to pay the reward binding. The promisor cannot refuse to pay on the ground that the promisee was not bound to perform the services.<sup>†</sup> So, if a person says to another, “If you will employ this man as your agent for a time, I will be responsible for all such sums as he shall receive during that time and neglect to pay over to you,” the party indemnified is not bound to employ the person designated, and the guarantor may, before such employment, withdraw his promise; but, if the promisee does employ him before such withdrawal, the guaranty becomes binding.<sup>74</sup> On the same principle, where a continuing guaranty is given for the purpose of obtaining credit for the principal, furnishing him goods under the guaranty supplies a consideration, and renders it binding to the extent of the goods furnished.<sup>75</sup>

*Other Contingent or Conditional Promises.*

It must not be inferred from what has been said that no contingent promise can form a consideration for a promise given in

<sup>73</sup> *L'Amoureux v. Gould*, 7 N. Y. 349; *Train v. Gold*, 5 Pick. (Mass.) 380. So, where the owner of land and a broker entered into a written agreement by which the owner made certain promises in case the broker should procure a purchaser for the land, and also promised to pay him a certain per cent. of the price in case he (the owner) should himself first sell it, it was held that though, at the time the contract was signed, it was nudum pactum, because there was nothing binding on the broker, and he paid nothing, yet, where the broker afterwards rendered services and incurred expenses in advertising the land, in carrying out the agreement, he furnished a consideration, and the promise became binding on the owner. *Goward v. Waters*, 98 Mass. 596. But see *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. Rep. 669.

<sup>†</sup> Ante, p. 55.

<sup>74</sup> *Leake*, Cont. 25; *Kennaway v. Treleavan*, 5 Mees. & W. 501; *Mills v. Blackall*, 11 Q. B. 366; *Offord v. Davies*, 12 C. B. (N. S.) 748.

<sup>75</sup> *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. Rep. 251; *Taussig v. Reid*, 145 Ill. 488, 32 N. E. Rep. 918.

return. If a person agrees to buy, and another person to sell, all the supplies of a certain kind the former "may need," or that the latter "may have to sell," there is no want of mutuality, and the contract is binding. One of the parties binds himself absolutely to take all the supplies he may need, not merely to take what supplies he may choose to take; and the other binds himself absolutely to sell all he may have to dispose of; and each promise is a consideration for the other. They differ from options, for, if there are any supplies needed, they must be bought, and, if there are any to be sold, they must be delivered.<sup>76</sup>

Somewhat similar in character are the considerations which consist in conditional promises; as, for instance, where a person promises to do something for a reward, but the other party only binds himself to pay the reward upon the happening of an event which may not be under the control of either party. Such would be the case in a building contract where the promise to pay for the work to be done is made conditional upon the approval of the architect. Again, the promise may be conditional on something happening, as in case of promises in a charter party which are not to take effect if certain specified risks occur. In the one case the promise depends for its fulfillment upon a condition precedent; in the other it is liable to be defeated by a condition subsequent. In neither case does its conditional character prevent it from forming a sufficient consideration for promises given in return. These cases are for consideration in a subsequent chapter.

#### **SAME—FORBEARANCE TO EXERCISE A RIGHT.**

**76. Forbearance or a promise to forbear from doing what one is otherwise entitled to do is a sufficient consideration.**

<sup>76</sup> See *Sheffield Furnace Co. v. Hull C. & C. Co.* (Ala.) 14 South. Rep. 672; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. Rep. 142; *Smith v. Morse*, 20 La. Ann. 220; *Bradley v. U. S.*, 96 U. S. 163; *Lobenstein v. U. S.*, 91 U. S. 324; *Grant v. U. S.*, 7 Wall. 331. Where land was agreed to be sold, and the title was defective, by reason of a suit to set aside a will under which the vendor claimed, an agreement to postpone execution of the contract until determination of the suit was sustained on the ground that the vendee would be bound to accept the title if the will should be sustained. *Hale v. Cravener*, 128 Ill. 408, 21 N. E. Rep. 534. See ante, p. 65, note 125.

77. There must be agreement to forbear as well as forbearance.

78. Though no time of forbearance is specified, actual forbearance for a reasonable time is sufficient.

Consideration need not necessarily consist of acts or promises which the party furnishing the consideration is not otherwise liable to do or make. It may, as we have seen, consist in a forbearance or promise to forbear from doing what he is otherwise entitled to do; as, for instance, where a person abstains from the use of liquor and tobacco, on another's promise to pay him money.<sup>78</sup> The abandonment of any right, or a promise to forbear from exercising it, is a sufficient consideration for a promise.<sup>79</sup> The right may be legal or equitable, certain or doubtful; and it may exist against the promisor or against a third party. The release by a wife, for instance, of her inchoate right of dower in her husband's land, will support a promise by her husband's grantee to pay her a sum of money;<sup>80</sup> and the release of an inchoate right of homestead in public lands will support a promise.<sup>81</sup> A creditor, likewise, if he extends the time for payment of the debt, gives up a right, and so furnishes a consideration for an additional promise by the debtor,<sup>82</sup> or for the

<sup>78</sup> *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. Rep. 256; *Talbott v. Stemmons*, 89 Ky. 222, 12 S. W. Rep. 297; *Lindell v. Rokes*, 60 Mo. 249. For other illustrations, see ante, pp. 149, 150.

<sup>79</sup> *Blake v. Peck*, 11 Vt. 483; *Leverenz v. Haines*, 32 Ill. 357; *Woodburn v. Woodburn*, 123 Ill. 608, 14 N. E. Rep. 58, and 16 N. E. Rep. 209; *Calkins v. Chandler*, 36 Mich. 320. Agreement between attachment creditors of a debtor. *Mygatt v. Tarbell*, 78 Wis. 351, 47 N. W. Rep. 618; *Doan v. Dow* (Ind. App.) 35 N. E. Rep. 709; *Brownell v. Harsh*, 29 Ohio St. 631. Forbearance to contest will. *Rector, etc., v. Teed*, 120 N. Y. 583, 24 N. E. Rep. 1014. The release by a person of a claim, in good faith, of a future contingent interest in certain land under the will of a deceased ancestor, is a sufficient consideration for a note given therefor, whether he in fact had any interest in the land or not. *Brooks v. Wage*, 85 Wis. 12, 54 N. W. Rep. 997. Release of mortgage. *Norris v. Vosburgh* (Mich.) 57 N. W. Rep. 284.

<sup>80</sup> *Worley v. Sipe*, 111 Ind. 238, 12 N. E. Rep. 385.

<sup>81</sup> *McCabe v. Caner*, 68 Mich. 182, 35 N. W. Rep. 901. And see *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. Rep. 271.

<sup>82</sup> *Lipsmeier v. Vehslage*, 29 Fed. Rep. 175; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. Rep. 503; *Van Gorder v. Bank* (Pa. Sup.) 7 Atl. Rep. 144; *Sinker v.*

promise of a third party to guaranty or pay the debt.<sup>83</sup> So, also, the discharge of a debtor from the debt,<sup>84</sup> or from lawful imprisonment for the debt,<sup>85</sup> is a consideration for the promise of a third person to pay the debt; and the surrender or cancellation of a note or mortgage is a consideration for a new note or mortgage.<sup>86</sup>

Agreement to forbear is necessary. Mere forbearance to sue, for instance, without any agreement to that effect, is not a sufficient consideration for the promise of another to pay the debt of the person liable, though the act of forbearance may have been induced by the promise.<sup>87</sup>

#### *Compromises.*

A common form in which a forbearance appears as the consideration for a promise is in the settlement or compromise of a disputed claim, either before or after an action has been brought upon it. Forbearance by a person to further insist upon a demand, or to further prosecute an action which he has commenced, is, subject to exceptions to be presently explained, a sufficient consideration to support a promise by the other party, or by a third person.<sup>88</sup>

Green, 113 Ind. 264, 15 N. E. Rep. 266; Brown v. Bank, 115 Ind. 572, 18 N. E. Rep. 56; Lundberg v. Elevator Co., 42 Minn. 37, 43 N. W. Rep. 635; Sanders v. Smith (Miss.) 5 South. Rep. 514; Frazer v. Backus, 62 Mich. 540, 29 N. W. Rep. 92.

\* Calkins v. Ohandler, 86 Mich. 320; Bank of New Hanover v. Bridgers, 98 N. C. 67, 3 S. E. Rep. 826; Forrester v. Parker, 14 Daly (N. Y.) 208; Hockenbury v. Meyers, 34 N. J. Law, 346. Substitution of new bond for old one, as consideration for third person's guaranty of new bond. Erie Co. Sav. Bank v. Colt, 104 N. Y. 532, 11 N. E. Rep. 54.

\* Whitney v. Clary, 145 Mass. 156, 13 N. E. Rep. 393; Carpenter v. Page, 144 Mass. 315, 10 N. E. Rep. 853; Fulton v. Laughlin, 118 Ind. 296, 20 N. E. Rep. 796.

\* Smith v. Monteith, 13 Mees. & W. 427.

\* Constant v. University, 111 N. Y. 604, 19 N. E. Rep. 631; Erie Co. Sav. Bank v. Colt, 104 N. Y. 532, 11 N. E. Rep. 54.

\* Manter v. Churchill, 127 Mass. 31. And see Mecorny v. Stanley, 8 Cush. (Mass.) 85; Shadburne v. Daly, 76 Cal. 355, 18 Pac. Rep. 403.

\* McKinley v. Watkins, 13 Ill. 140; Cook v. Wright, 1 Best & S. 559; Collier v. Bischoffsheimer, L. R. 5 Q. B. 449; McClellan v. Kennedy, 8 Md. 247; Longridge v. Dorville, 5 Barn. & A. 117; Jones v. Rittenhouse, 87 Ind. 348; Fisher v. May, 2 Bibb (Ky.) 448; Hennessy v. Bacon, 137 U. S. 85, 11 Sup. Ct. Rep. 17; Slisson v. City of Baltimore, 51 Md. 83; Crowther v. Farrer,



The demand, however, as we shall presently see, must be at least doubtful, for to forbear from suing on an unenforceable demand is no consideration; and where suit is brought there must, according to the better opinion, be a bona fide belief in the right to sue, and reasonable ground for such belief.<sup>15</sup>

Illustrations of such a consideration as we are now discussing are furnished by cases in which one party makes a claim or demand on another, and the latter disputes it, whereupon they settle the dispute by a compromise, or by agreeing upon the amount due in an account stated. The promise to pay the amount settled upon is supported by a sufficient consideration, and may be enforced, though the promisor might be able to prove that nothing was in fact due from him.<sup>16</sup>

Since, as we have seen, a detriment suffered by the promisee will support a promise, whether the promisor has received a benefit or not, a compromise will support a promise by a third party.<sup>17</sup>

#### *Time of Forbearance.*

Questions have been raised as to the length of time over which a forbearance to sue must extend in order to constitute a consideration. It has even been held that a promise of forbearance for an unspecified time was insufficient,<sup>18</sup> but it is now settled that a promise of forbearance, in order to form a consideration, need not be a

15 Q. B. 677; *Nash v. Armstrong*, 10 C. B. (N. S.) 259; *Heffelfinger v. Hummel* (Iowa) 57 N. W. Rep. 872; *McClure v. McClure* (Cal.) 34 Pac. Rep. 822. The suit need not be actually discontinued before suit on the promise. The agreement ends it. *Phillips v. Pullen*, 50 N. J. Law, 439, 14 Atl. Rep. 222; *Van Campen v. Ford* (Sup.) 6 N. Y. Supp. 139; *Rappanier v. Bannon* (Md.) 8 Atl. Rep. 555.

<sup>16</sup> Post, p. 178.

<sup>17</sup> *Grandin v. Grandin*, 49 N. J. Law, 508, 9 Atl. Rep. 756; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. Rep. 76; *Miles v. New Zealand, etc., Co.*, 32 Ch. Div. 266; *Korne v. Korne*, 30 W. Va. 1, 3 S. E. Rep. 17; *Neibles v. Minneapolis & St. L. R. Co.*, 37 Minn. 151, 33 N. W. Rep. 332; *Honeyman v. Jarvis*, 79 Ill. 318; *Schaben v. Brunning*, 74 Iowa, 102, 36 N. W. Rep. 910; *Potts v. Polk Co.*, 80 Iowa, 401, 45 N. W. Rep. 775. And see cases cited in notes 98-102, *infra*.

<sup>18</sup> *Bane's Case* (1611) 9 Coke, 93b. Withdrawal of a suit against a person, for instance, will support his father's note. *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. Rep. 714.

<sup>19</sup> *Semple v. Plink*, 1 Exch. 74. See *Payne v. Wilson*, 7 Barn. & C. 423.

promise of absolute forbearance, nor even of forbearance for a definite time. Where no time is mentioned, a reasonable time will be implied, or, at any rate, where there is a promise to forbear, and actual forbearance for a reasonable time, it is enough."

### SAME—FORBEARANCE TO DO WHAT ONE CANNOT LEGALLY DO.

79. Forbearance or a promise to forbear from doing what one cannot legally do is no consideration; but

80. If a right is doubtful, so that there are reasonable grounds for trying to enforce it, forbearance is a sufficient consideration.

81. Where the forbearance is in the compromise of a disputed claim made or action brought in good faith, and on reasonable grounds,\* forbearance to insist or sue on the claim, or to further prosecute the action, is a sufficient consideration without regard to the validity of the claim.

We have already incidentally stated that it is no consideration for a promise for a man to forbear or to promise to forbear from doing what he is not legally entitled to do.<sup>4</sup> This proposition would

\* *Oldershaw v. King*, 2 Hurl. & N. 399, 517; *Alliance Bank v. Broom*, 2 Drew. & S. 289; *Howe v. Taggart*, 133 Mass. 284; *Boyd v. Frelze*, 5 Gray (Mass.) 553; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Bowen v. Tipton*, 64 Md. 273, 1 Atl. Rep. 861; *Calkins v. Chandler*, 38 Mich. 320; *Moore v. McKenney*, 83 Me. 80, 21 Atl. Rep. 749; *Ballard v. Burton*, 64 Vt. 387, 24 Atl. Rep. 769; *Downing v. Funk*, 5 Rawle (Pa.) 69; *King v. Upton*, 4 Greenl. (Me.) 387; *Foard v. Grinter* (Ky.) 18 S. W. Rep. 1034; *Traders' Bank v. Parker*, 130 N. Y. 415, 29 N. E. Rep. 1094; *Rood v. Jones*, 1 Doug. (Mich.) 188. But see *Garnett v. Kirkman*, 33 Miss. 389; *Russell v. Clark*, 3 Watts (Pa.) 213.

\* A few of the cases, as we shall see, seem to hold that if an action is brought in good faith, and the plaintiff believes in his case, it is immaterial whether he has any cause of action or not, or even whether he has reasonable grounds for believing that he has a good cause of action; but, if any of the cases do go to this extent, they are contrary to the weight of authority.

\* *Barnard v. Simons* (A. D. 1616) 1 Rolle, Abr. 26, Langd. Cas. Cont. 194. In this old case it was said that "If A. makes a void assumption to B., and afterwards a stranger comes to B., and, in consideration that B. will relinquish

seem too obvious to require discussion, but questions have arisen in its application, and have given rise to some conflict in the decisions. It is therefore necessary to notice it at some length.

Some applications of the principle are clear. A forbearance or promise to forbear, for instance, from claims under an illegal contract, such as a gambling contract, or a contract involving the commission of crime, can form no consideration for the promise of the other party, since the contract is void, and could not be enforced.<sup>95</sup> So, also, the release of a debtor from imprisonment was held to be no consideration for a promise where, by the previous release of a codebtor, the debt had been discharged, since the imprisonment was therefore unlawful;<sup>96</sup> and the same is true of forbearance or a promise to forbear from suing out an attachment where there is no ground for attachment.<sup>97</sup>

As a general rule, it is safe to say that, in order that forbearance to exercise a right may constitute a consideration, the right must be at least doubtful. Forbearance to insist upon a claim that is clearly unenforceable cannot be a consideration, for there is neither detriment to the promisee from the forbearance nor any real benefit to the promisor.

#### *Compromises.*

As already intimated, much difficulty has arisen in applying this principle to compromises of disputed claims and actions, and there is conflict in the decisions. The authorities are all agreed that the promisee must believe in his claim, or in his action; and that forbearance to sue on a demand known to be unenforceable, or to pro-

the assumpsit made to him by A., he promises to pay him £10, this is not a good consideration to charge him, because the first assumpsit was void." See *Palfrey v. Portland R. Co.*, 4 Allen (Mass.) 53; *Shuder v. Newby*, 83 Tenn. 348, 3 S. W. Rep. 438; *Clark v. Jones*, 85 Ala. 127, 4 South. Rep. 771; *Sharpe v. Rogers*, 12 Minn. 174 (Gil. 103); *Harris v. Cassaday*, 107 Ind. 158, 8 N. E. Rep. 29; *Ecker v. McAllister*, 54 Md. 369; *Schroeder v. Fink*, 60 Md. 438; *Long v. Towl*, 42 Mo. 545; *Martin v. Black*, 20 Ala. 309; *Prater v. Miller*, 25 Ala. 320; *Davisson v. Ford*, 23 W. Va. 617; *Eblin v. Miller*, 78 Ky. 371.

<sup>95</sup> *Everingham v. Melghan*, 55 Wis. 354, 13 N. W. Rep. 269.

<sup>96</sup> *Herring v. Darrell*, 8 Dowl. Pr. Cas. 604.

<sup>97</sup> *Smith v. Easton*, 54 Md. 133; *Bates v. Sandy*, 27 Ill. App. 552. And see *Bidwell v. Catton* (1618) Hob. 216. If the right to attach is doubtful, forbearance is a consideration. *Blake v. Peck*, 11 Vt. 483.

ceed in an action knowingly brought without cause, is no consideration."<sup>99</sup> When we reach this point, the difficulty begins. It has been said, for instance, in an English case, that the plaintiff must believe that he has a case, and must intend *bona fide* to maintain it by action; and that, if he does so, the fact that in reality he has no cause of action, and that the defendant knows that he has none, will not render the compromise invalid, for the plaintiff abandons a claim which he believes to be enforceable, and intended to try and enforce, and the defendant escapes the inconvenience, expense, and anxieties of litigation."<sup>100</sup> In another case it was said: "If a man *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to do so will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise obtained an advantage under it. In that case his conduct would be fraudulent."<sup>101</sup> These cases seem to allow the whole question to depend on the good faith of the party forbearing, without any regard whatever to the validity of his claim; and, if this is so, they can be sustained neither in reason nor on principle.

Most of the courts have said that the claim must be at least doubtful; or that it must not only be *bona fide*, but under "color of right;" or that there must be reasonable grounds for belief in the validity of the claim,<sup>101</sup>—and this would seem to be the proper doc-

<sup>99</sup> *Wade v. Simeon*, 2 C. B. 548; *McKinley v. Watkins*, 13 Ill. 140; *Rood v. Jones*, 1 Doug. (Mich.) 188; *McGlynn v. Scott* (N. D.) 58 N. W. Rep. 460; *Phillips v. Pullen*, 50 N. J. Law, 439, 14 Atl. Rep. 222; *Von Brandenstein v. Ebensberger*, 71 Tex. 267, 9 S. W. Rep. 153.

<sup>100</sup> *Cook v. Wright*, 1 Best & S. 559. And see *Rue v. Meirs*, 43 N. J. Eq. 377, 12 Atl. Rep. 369; *Feeter v. Weber*, 78 N. Y. 334; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Demars v. Manufacturing Co.*, 37 Minn. 418, 35 N. W. 1; *Fisher v. May*, 2 Bibb (Ky.) 448.

<sup>101</sup> *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449.

<sup>102</sup> *McKinley v. Watkins*, 13 Ill. 140; *Palfrey v. Portland, S. & P. R. Co.*, 4 Allen (Mass.) 55; *Anthony v. Boyd*, 15 R. I. 495, 8 Atl. Rep. 701, and 10 Atl. Rep. 457; *Edwards v. Baugh*, 11 Mees. & W. 641; *United States Mortgage*

trine. An ignorant person may in good faith believe that he has a just claim against another, when in fact there is not the slightest ground for his belief. Can it be that a promise exacted from the other in order that he may escape the annoyance and expense of litigation furnishes any consideration? The proper doctrine is that, "in order to support the promise, there must be such a claim as to lay a reasonable ground for the defendant's making the promise; and then it is immaterial on which side the right may ultimately prove to be."<sup>102</sup> It may be that, according to some of the cases, there is a distinction between a compromise of a claim not sued upon and the compromise of an action actually commenced; but there is no reason in any such distinction. There can be no difference, in respect of consideration, between a compromise to prevent a threatened suit and a compromise after the suit has been brought. In either case, if there is no reasonable ground for belief in the validity of the claim, forbearance furnishes no consideration.

#### SAME—GRATUITOUS BAILMENT.

**82. The mere leaving of property in another's possession will support his promise to take reasonable care of it, or undertake services in respect of it.**

Co. v. Henderson, 111 Ind. 24, 12 N. E. Rep. 88; Emmittsburgh R. Co. v. Donoghue, 67 Md. 383, 10 Atl. Rep. 233; Clark v. Turnbull, 47 N. J. Law, 265; Mulholland v. Bartlett, 74 Ill. 58; Fisher v. May, 2 Bibb (Ky.) 448; Logan v. Mathews, 6 Pa. St. 417; Bellows v. Sowles, 55 Vt. 391; Ware v. Morgan, 67 Ala. 462; Crans v. Hunter, 28 N. Y. 389; Ecker v. McAllister, 54 Md. 362; Long v. Towl, 42 Mo. 545; Gates v. Shutts, 7 Mich. 126; White v. Hoyt, 73 N. Y. 505; Flannagan v. Kilcome, 58 N. H. 443; McClellan v. Kennedy, 8 Md. 247; Van Dyke v. Davis, 2 Mich. 144; Honeyman v. Jarvis, 79 Ill. 318; Parker v. Enslow, 102 Ill. 272; Perkins v. Gay, 3 Serg. & R. (Pa.) 331; Korne v. Korne, 30 W. Va. 1, 3 S. E. Rep. 17; Russell v. Wright (Ala.) 13 South. Rep. 594; Appeal of Gormley, 130 Pa. St. 467, 18 Atl. Rep. 727. The doubt may arise from the unsettled state of the law on a question. Coffee v. Emigh, 15 Colo. 184, 25 Pac. Rep. 83. Compromise of differences under an illegal contract. Everingham v. Meighan, 55 Wis. 354, 13 N. W. Rep. 269.

<sup>102</sup> McKinley v. Watkins, 13 Ill. 140. And see cases cited in notes 94, 97, 98, 101, *supra*.

Among the cases in which an act is the consideration for a promise it is worth while to notice the kind of contract which arises upon the mere placing or leaving of property in the hands of a bailee or depositary. A person's promise to receive and care for or carry the property of another without compensation therefor could not be enforced against him if he should refuse to receive it. If, however, he does receive the property, the bailment, though gratuitous, will create an implied promise to use reasonable care in the safe custody of the property, and will support the express promise to undertake services in respect to it.<sup>103</sup> "A consideration of some kind is absolutely necessary to the validity of every contract, but it need not be in money, nor money's worth. In the case of a bailment the bare being trusted with another's goods is a sufficient consideration, if the bailee once enters upon the trust, and takes the goods into his possession."<sup>104</sup>

#### SAME—NATURAL AFFECTION.

83. Natural love and affection for a near relative is sufficient to sustain an executed contract, except as against creditors and bona fide purchasers; but is no consideration for a promise.

Natural affection for a near relative, or, as it is generally said, the consideration of blood, or natural love and affection, is said to be a "good," but not a "valuable," consideration. In the law of contract the consideration must be "valuable." In some early English cases it was attempted to ingraft the doctrine of good consideration, which had been applied in case of covenants to stand seized, upon the law of contract, but it was not allowed. The mere existence of natural affection as a motive for a promise has prob-

<sup>103</sup> *Coggs v. Barnard*, *Ld. Raym.* 909; *Hart v. Miles*, 4 C. B. (N. S.) 371; *Robinson v. Threadgill*, 13 *Ired.* (N. C.) 39; *Clark v. Gaylord*, 24 *Conn.* 484; *Wheatley v. Low*, *Cro. Jac.* 668; *Ames v. Taylor*, 49 *Me.* 381; *Beardslee v. Richardson*, 11 *Wend.* (N. Y.) 25; *Dart v. Lowe*, 5 *Ind.* 131; *Newhall v. Paige*, 10 *Gray* (Mass.) 366. There is conflict as to the implied undertaking of a gratuitous bailee. Most courts, probably, hold him liable for gross negligence only. This, however, is not within the scope of our subject.

<sup>104</sup> *Robinson v. Threadgill*, 13 *Ired.* (N. C.) 39.

ably never been held to amount to a valuable consideration, so as to support an executory contract.<sup>106</sup> A good, as distinguished from a valuable, consideration is sufficient to support a conveyance or gift; but, as we have seen, these are not strictly contracts, for they create rights in rem, and not rights in personam. Even in these cases, as against creditors and bona fide purchasers, the conveyance or gift may be set aside for the want of consideration.<sup>106</sup>

### SAME—MORAL OBLIGATION.

**84. Mere moral obligation or honorable and conscientious scruples will not support a promise.**

There are some cases to the effect that a mere moral obligation is sufficient consideration to support a promise,<sup>107</sup> but it is now well settled to the contrary.<sup>108</sup> A man may believe himself to be under a moral obligation, either because he has received actual benefits in the past, or from motives of piety, delicacy, or friendship. Now,

<sup>106</sup> *Bret v. J. S. and Wife*, Cro. Eliz. 755; *Fink v. Cox*, 18 Johns. (N. Y.) 145; *Priester v. Priester*, Rich. Eq. (S. C.) 26; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Smith v. Kittridge*, 21 Vt. 238; *Phillips v. Frye*, 14 Allen (Mass.) 36; *Pennington v. Gittings*, 2 Gill & J. (Md.) 208; *Dugan v. Gittings*, 3 Gill (Md.) 138; *Whitaker v. Whitaker*, 52 N. Y. 368; *Cotton v. Graham*, 84 Ky. 672, 2 S. W. Rep. 647; *Hadley v. Reed*, 58 Hun, 608, 12 N. Y. Supp. 163; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. Rep. 463; *Wilbur v. Warren*, 104 N. Y. 196, 10 N. E. Rep. 263.

<sup>107</sup> See ante, p. 152, and cases there cited.

<sup>108</sup> *Hawkes v. Saunders*, Cowp. 289; *Lee v. Muggeridge*, 5 Taunt. 36; *Clark v. Herring*, 5 Blinn. (Pa.) 35; *Glass v. Beach*, 5 Vt. 173; *State v. Reigart*, 1 Gill (Md.) 1; *Drury v. Briscoe*, 42 Md. 162; *Musser v. Ferguson*, 55 Pa. St. 475. And see *Brown v. Latham* (Ga.) 18 S. E. Rep. 421. Questioned in *Littlefield v. Shee*, 2 Barn. & Adol. 811. See post, p. 439.

<sup>109</sup> *Eastwood v. Kenyon*, 11 Adol. & El. 438; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Beaumont v. Reeve*, 8 Q. B. 483; *Ehle v. Judson*, 24 Wend. (N. Y.) 97; *Cook v. Bradley*, 7 Conn. 57; *Valentine v. Foster*, 1 Metc. (Mass.) 520; *Updyke v. Titus*, 13 N. J. Eq. 151; *Farnham v. O'Brien*, 22 Ma. 475; *Schroeder v. Fink*, 60 Md. 436; *Shepard v. Rhodes*, 7 R. I. 470; *Gay v. Botta*, 13 Bush (Ky.) 299; *Cobb v. Cowdery*, 40 Vt. 25; *Osler v. Hobbs*, 33 Ark. 215; *McElven v. Sloan*, 56 Ga. 208; *Ellicott v. Peterson*, 4 Md., at page 492. A promise by a husband to his wife on her deathbed that their son should have certain property is not a valuable consideration for a conveyance from the father to the son. *Peek v. Peek*, 77 Cal. 106, 19 Pac. Rep. 227.

a past consideration, as will presently be seen, is in truth no consideration at all, for the promisor does not receive a benefit, nor the promisee suffer a detriment, in return for the promise. There are certain exceptions to this statement, which will be noticed in treating of past consideration, but it will be seen that the validity of the promise in those cases does not properly rest on the basis of moral obligation, though some courts put it upon that ground. The insufficiency of past benefits to support a promise on the ground of moral obligation was settled in England in a case in which it was said: "The doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."<sup>100</sup>

If the actual receipt of a benefit in the past does not constitute consideration for a subsequent promise, still less will such duties of honor, conscience, or friendship as a man may conceive to be incumbent on him. A man may be said to be morally bound to support his children in a manner suited to his own condition, but the law creates no such obligation.<sup>110</sup> Some people may say that a man is in honor bound to pay money lost in a wager, but, inasmuch as the law has declared wagers to be void, a promise to pay such a debt would be unenforceable for want of a consideration. In like manner, a pious wish on the part of executors to carry out the intentions of the testator is no consideration for promises made by them.<sup>111</sup>

#### SAME—IMPOSSIBLE PROMISES.

**85. A promise to do something which is either impossible in law, or physically impossible, is no consideration. The thing must be impossible on its face; not merely improbable, or impossible to the promisor.**

The courts will also hold a consideration unreal, and therefore no consideration at all, where it is impossible upon its face. As will presently be seen, practical impossibility, unknown to the

<sup>100</sup> *Eastwood v. Kenyon*, 11 Adol. & E. 438; *Ehle v. Judson*, 24 Wend. (N. Y.) 97.

<sup>110</sup> *Mortimore v. Wright*, 6 Mees. & W. 482; *Reg. v. Downes*, 1 Q. B. Div. 25.

<sup>111</sup> *Anson*, Cont. 79; *Thomas v. Thomas*, 2 Q. B. 851.



parties when they entered into their contract, may avoid it on the ground of mistake;<sup>112</sup> or impossibility of performance, arising subsequent to the making of the contract, may, under some circumstances, operate as a discharge;<sup>113</sup> but we are here concerned with promises to do a thing so obviously impossible that the promise can form no real consideration.

The consideration may be either (1) impossible in law, or (2) physically impossible. Where, for instance, a debtor made a promise to the servant of his creditor in consideration of a promise by the servant to release him from the debt, it was held that there was no consideration for the debtor's promise, as the servant had no power to release the debt.<sup>114</sup> So, also, an undertaking that another's land shall sell for a given sum on a certain day has been held insufficient to support a promise, on the ground that a person cannot compel the sale of another's property.<sup>115</sup> In these cases the consideration is impossible in law. A promise to go from New York to London in a day would be physically impossible, and could form no consideration for a promise given in return.<sup>116</sup>

Impossibility, as used in this connection, does not mean anything more than a *prima facie* legal impossibility or physical impossibility "according to the state of knowledge of the day."<sup>117</sup> In the first case of legal impossibility mentioned above, the promisor might procure the release of the debt; and, in the second case, he might procure the owner of the land to sell it by the time specified. There is, however, a *prima facie* legal impossibility, and this is enough. So it may be that, in the future, means may be discovered by which one may be able to travel from New York to London in a day; but, according to the present state of knowledge, it is physically impossible. It was said in a New York case that if the promise be "within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be

<sup>112</sup> Post, p. 296.

<sup>113</sup> Post, p. 678.

<sup>114</sup> *Harvey v. Gibbons*, 2 Lev. 161. And see *Ward v. Hollins*, 14 Md. 158.

<sup>115</sup> *Stevens v. Coon*, 1 Pin. (Wis.) 356.

<sup>116</sup> See *James v. Morgan*, 1 Lev. 111; *Thornborow v. Whiteacre*, 2 Ld. Raym. 1164.

<sup>117</sup> Per Brett, J., in *Clifford v. Watts*, L. R. 5 C. P. 577, 588.

upheld; as where one covenants it shall rain to-morrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible."<sup>118</sup>

#### SAME—VAGUE PROMISES.

**86. A promise which is so vague and indefinite as to be incapable of enforcement is no consideration.**

Again, a consideration may be unreal because it is so vague in its terms as to be practically incapable of enforcement. In such case it may be classed with impossible considerations. Where, for instance, in an action on a note given by a son to his father the son pleaded a promise made by his father to discharge him from liability on the note in consideration of his ceasing to make certain complaints, which he had been in the habit of making, to the effect that he had not enjoyed as many advantages as the other children, it was said that the son's promise was no more than a promise "not to bore his father," and it was held too vague to constitute a consideration for the father's promise. "A man," said the court, "might complain that another person used the highway more than he ought to do, and that other might say, 'Do not complain, and I will give you £5.' It is ridiculous to suppose that such promises could be binding."<sup>119</sup>

We have already sufficiently discussed the question of vagueness and uncertainty in agreements.\*

<sup>118</sup> *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, citing 3 Com. Dig. 93; 1 Rolle, Abr. 419. And see *Watson v. Blossom* (Sup.) 4 N. Y. Supp. 489; *Clifford v. Watts*, L. R. 5 C. P. 588; *The Harriman v. Emerick*, 9 Wall 161.

<sup>119</sup> *White v. Bluett*, 23 Law J. Exch. 36, 2 Com. Law Rep. 301. And see *Appeal of Ballou*, 133 Pa. St. 64, 19 Atl. Rep. 304.

\* Ante, p. 63.

**SAME—DOING WHAT ONE IS BOUND TO DO.**

87. Doing or promising to do what one is already legally bound to do is no consideration. Such previous obligation may arise—

- (a) By virtue of a prior contract, or
- (b) By law, independently of contract.

88. Under this rule, payment of part of a debt is not a good discharge of the debt, though received as such by the creditor, unless—

- EXCEPTIONS—**(a) The residue of the debt is expressly given to the debtor,
- (b) Or is released by an instrument under seal,
  - (c) Or unless there is a collateral consideration for the promise to forego the residue.
  - (d) Part payment, received in satisfaction of a debt, is declared a good discharge by statute in a few jurisdictions.

Another form of unreality of consideration is where the alleged consideration is a promise to do, or actually doing, what a person is already bound to do. The promisor gets no more in return for his promise than the promisee was already bound to give, and therefore receives no consideration.<sup>120</sup> Such prior obligation may

<sup>120</sup> *Conover v. Stillwell*, 34 N. J. Law, 54; *Jennings v. Chase*, 10 Allen (Mass.) 526; *Warren v. Hodge*, 121 Mass. 106; *Schuler v. Myton*, 48 Kan. 282, 29 Pac. Rep. 163; *Ayres v. Chicago, etc., R. Co.*, 52 Iowa. 478, 3 N. W. Rep. 522; *Holmes v. Boyd*, 90 Ind. 332; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328; *Keffer v. Grayson*, 76 Va. 517; *Harris v. Cassaday*, 107 Ind. 158, 8 N. E. Rep. 29; *Tilden v. City of New York*, 56 Barb. (N. Y.) 340; *Stuber v. Schack*, 83 Ill. 191; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Harriman v. Harriman*, 12 Gray (Mass.) 341; *Tucker v. Bartle*, 85 Mo. 114; *Eblin v. Miller*, 78 Ky. 371; *Sherwin v. Brigham*, 39 Ohio St. 137; *Watts v. Frenche*, 19 N. J. Eq. 407; *Bickhart v. Hoffmann* (Com. Pl.) 19 N. Y. Supp. 472; *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. Rep. 886; *Jenness v. Lane*, 26 Me. 475. And see *Dixon v. Adams* (A. D. 1596) Cro. Ellz. 538, Langd. Cas. Cont. 191; *Kent v. Pratt* (1610) 1 Rolle, Abr. 23, Langd. Cas. Cont. 193; opinion of Byles, J., in *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159. On this prin-

arise (1) from a previous contract, or (2) from law, independently of contract.

Where, for instance, a seaman deserted a vessel, and the captain promised the rest of the crew extra pay if they would work the vessel home, the promise was held to be without consideration, because the seamen had, before sailing, agreed to do all they could under all the emergencies of the voyage, and the desertion by some of the seamen was an emergency. Here the seamen promised no

ciple, a promise by a creditor after maturity of the debt, to extend the time of payment, is not binding unless some collateral consideration is received. *Hoffman v. Coombs*, 9 Gill (Md.) 284; *Turnbull v. Brock*, 31 Ohio St. 649; *Pfeiffer v. Campbell*, 111 N. Y. 631, 19 N. E. Rep. 498; *Holmes v. Boyd*, 90 Ind. 332; *Stuber v. Schack*, 83 Ill. 191; *Planters' Bank v. Sellman*, 2 Gill & J. (Md.) 230; *Ives v. Bosley*, 35 Md. 262. It has been held, however, that a promise to extend a note and reduce the rate of interest is supported by the agreement of the debtor to forego his right to pay at any time, and to keep the money during the time of the extension. *Simpson v. Evans*, 44 Minn. 419, 46 N. W. Rep. 908. Promise to pay interest is a consideration for the extension. *Fawcett v. Freshwater*, 31 Ohio St. 637; *Moore v. Redding*, 69 Miss. 841, 13 South. Rep. 849; but not where the promisor is already bound to pay the interest promised. *Stuber v. Schack*, 83 Ill. 191; *Holmes v. Boyd*, 90 Ind. 332; *Helms v. Crane* (Tex. App.) 23 S. W. Rep. 392. Payment by an indorser, or his promise to pay notes on which he is already fixed and holden by due protest, is no consideration for another's promise, but it is otherwise where the payment is before he has become so fixed and holden. *L'Amoureux v. Gould*, 7 N. Y. 349. Part payment of a note which is past due is no consideration for a promise to extend the time of payment of the balance. *Turnbull v. Brock*, 31 Ohio St. 649; note 132, *infra*. Payment by mortgagor of taxes which are a prior lien, as consideration for release by mortgagee of part of debt. *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. Rep. 365. An agreement by which a surety on a note assumes its payment, thereby becoming the principal, the former principal becoming surety, is a sufficient consideration to support a chattel mortgage for the same amount from the new surety to the principal. *Green v. Kelley*, 64 Vt. 309, 24 Atl. Rep. 183. Surrender of mortgaged premises by the mortgagor after condition broken, "to save the mortgagee trouble in getting possession," is no consideration for a promise by the mortgagee. *Wendover v. Baker* (Mo. Sup.) 25 S. W. Rep. 918. Performance by a contractor before fulfillment of a condition precedent to his obligation to proceed with the work is a consideration for a third party's promise to pay him. *Brownlee v. Lowe*, 117 Ind. 420, 20 N. E. Rep. 301. Promise by promoter of corporation to pay his subscription is no consideration for promise by another promoter to give the corporation a license to use a patent. *Havanna Press-Drill Co. v. Ashurst* (Ill. Sup.) 35 N. E. Rep. 873.

more than their contract bound them to do.<sup>121</sup> Where a public officer is required by law to make an arrest, a promise by an individual to pay him for doing so is without consideration;<sup>122</sup> and so it is with a promise to pay a public officer or a witness extra compensation for performing services for which his fees are fixed by law.<sup>123</sup> In these cases the officer or witness does no more than he is required by law to do, and therefore gives no consideration. Of course, it is otherwise with agreements to pay officers for doing something beyond the scope of their official duties.<sup>124</sup> The doctrine also applies to a promise to do or doing what one may be compelled to do in equity.<sup>125</sup> It will be seen from the cases mentioned that the actual performance of that which a man is legally bound to do stands on the same footing as his promise to do what he is legally compellable to do.

It must be noted that, to make the consideration unreal, the thing done or promised must be something the party is legally, and not merely morally, bound to do. If he is only under a moral obligation to do it, as in case of the payment of, or promise to pay, a debt barred by the statute of limitations, or for services rendered in the past, he gives something he is not legally compellable to give, and there is a consideration for the promise given in return.<sup>126</sup> These cases will be presently considered.

<sup>121</sup> *Stilk v. Meyrick*, 2 Camp. 317; *Harris v. Carter*, 3 El. & Bl. 559; *Bartlett v. Wyman*, 14 Johns. (N. Y.) 260; *Vanderbilt v. Schreyer*, 91 N. Y. 392. It would have been different if risks had arisen which were not contemplated by the contract. For instance, such a contract as in the case cited contains an implied warranty that the ship shall be seaworthy. So, where a seaman had signed articles of agreement to navigate a vessel, and the vessel proved unseaworthy, a promise of extra pay to induce him to abide by his contract was held binding. *Turner v. Owen*, 3 Fost. & F. 177.

<sup>122</sup> *Smith v. Whildin*, 10 Pa. St. 39. See post, p. 418.

<sup>123</sup> See *Lucas v. Allen*, 80 Ky. 681; *Hatch v. Mann*, 15 Wend. (N. Y.) 45. Since a witness, however, cannot be compelled to attend in another state, a party's promise of extra compensation to induce him to attend is binding. *Armstrong v. Prentice* (Wis.) 56 N. W. Rep. 742.

<sup>124</sup> *England v. Davidson*, 11 Adol. & E. 856. Promise to reimburse sheriff for expense in employment of special deputies to protect property from mob violence. *McCandless v. Allegheny, etc., Co.*, 152 Pa. St. 139, 25 Atl. Rep. 579.

<sup>125</sup> *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. Rep. 224.

<sup>126</sup> *Schreiner v. Cummins*, 63 Pa. St. 374.

The rule above stated would seem to be an obvious result of the doctrine of consideration, but some of its applications have met with severe criticism, and there is much direct conflict in the decisions on the subject.

*Mutual Discharge and Substituted Agreement.*

In the case of a contract which is wholly executory,—that is, a contract in which there is something to be done on both sides,—it can, as we shall see in treating of discharge of contract, be discharged by mutual consent. The acquittance of each from the other's claims in such a case is the consideration of each to waive his own.<sup>127</sup> If parties can so discharge the contract, it follows that they may substitute a new contract in its place. The soundness of this doctrine is clear where both parties enter into the discharge and substituted agreement voluntarily, and not under duress or circumstances. Suppose, however, that one of the parties to a contract refuses to perform, not because of any difficulty as to what he or the other party is required to do under the contract, but simply because he finds that he must suffer a loss by performance; and suppose the other party wishes performance, and requires it to prevent serious loss. Would a promise, made by him in order to induce the other to perform, of more than he was liable to pay or do under the original contract, be binding, or would it be void, on the ground that the only consideration for it is the promise by the other to perform the original contract,—a thing which he was already bound to do? The courts differ in their answers to this question. Some of them hold that the promise is without consideration and void.<sup>128</sup> Of course, where difficulties arise between the parties in the execution of a contract,—as, for instance, in regard to what the contract requires to be done,—they may substitute a new contract.

This, on principle, would seem to be the proper doctrine, but most

<sup>127</sup> *Rollins v. Marsh*, 128 Mass. 116.; *Cutter v. Cochrane*, 116 Mass. 408; *Farrar v. Tolliver*, 88 Ill. 408; *Windham v. Doles*, 59 Ga. 265; *Perkins v. Hoyt*, 35 Mich. 506. See post, p. 610.

<sup>128</sup> *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328; *Erb v. Brown*, 69 Pa. St. 210; *Ayres v. Chicago, etc., Ry. Co.* 52 Iowa, 478, 3 N. W. Rep. 522; *McCarthy v. Hampton Bldg. Ass'n*, 61 Iowa, 287, 16 N. W. Rep. 114; *Cobb v. Cowdery*, 40 Vt. 25; *Keith v. Miles*, 39 Miss. 442.

courts hold outright that, even where there is nothing more than refusal on the part of one party to perform, a new agreement, in which the other, to induce him not to break, but to go on with, his contract, promises to pay him a larger sum than originally promised, is binding.<sup>129</sup> Some of the courts base their decision on the ground that a person who has entered into a contract is entitled to choose between going on with it at a loss and the risk of an action by the other party for the breach. This might be a sound doctrine if a contract were, according to Mr. Justice O. W. Holmes, Jr.'s, conception of it, the mere taking of a risk; that is, if a party must be held to contemplate, when he gives a promise, not its performance, but the payment of damages for its breach, or performance, at his option, according as the one or the other may seem the more to his interest in the light of future developments. Such, however, does not seem the proper conception of contract. Certainly, as a rule, when a man makes a contract, he does so with the intention of performing it, and with the expectation of performance by the other party. It cannot be that a contract is nothing more than a mere gambling transaction,—a mere bet on its performance. To allow a man who has promised, on a sufficient consideration, to repudiate his promise when he finds that he is to suffer loss, and force the other party to pay an additional sum in order to obtain what he is already entitled to, encourages breach of contract and breach of faith.

As we shall presently see, a different rule than that stated at the beginning of this paragraph applies where the contract is wholly executed on one side.

*Promise to Third Party to Perform Existing Contract.*

In England, it has been held that if a man is bound by a contract to do a particular thing, and, while it is doubtful whether he will do it, a third person promises to pay him if he will do it, his performance will constitute a sufficient consideration for the third

<sup>129</sup> *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *Rollins v. Marsh*, 128 Mass. 116; *Osborne v. O'Reilly*, 42 N. J. Eq. 467, 9 Atl. Rep. 209; *Moore v. Detroit Loc. Works*, 14 Mich. 266; *Goebel v. Lynn*, 47 Mich. 489, 11 N. W. Rep. 284; *Coyner v. Lynde*, 10 Ind. 282; *Cooke v. Murphy*, 70 Ill. 96; *Connelly v. Devoe*, 37 Conn. 570; *Lawrence v. Davey*, 28 Vt. 264; *Lattimore v. Harsen*, 14 Johns. (N. Y.) 330. And see *Gibbons v. Bente* (Minn.) 53 N. W. Rep. 756; *Davis v. Bronson* (N. D.) 50 N. W. Rep. 836 (collecting the cases).

party's promise.<sup>120</sup> It is difficult, if not impossible, to reconcile such a case with the general rule which we have stated, or to find any reason for such an exception. In this country the contrary has been held in a number of states.<sup>121</sup>

*Part Payment in Satisfaction of Debt.*

Under the rule we have been discussing, the simple payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt, for it is doing no more than the debtor is already bound to do, and is therefore no consideration for the creditor's promise to forego the residue.<sup>122</sup> If, for instance, a person owes another

<sup>120</sup> *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159; *Scatson v. Pegg*, 6 Hurl. & N. 295.

<sup>121</sup> *Johnson v. Sellers*, 33 Ala. 265; *Putnam v. Woodbury*, 68 Me. 58; *L'Amoureux v. Gould*, 7 N. Y. 349; *Peelman v. Peelman*, 4 Ind. 612; *Merrick v. Giddings*, 1 Mackey (D. C.) 394; *Davenport v. First Cong. Soc.*, 33 Wis. 387; *Gordon v. Gordon*, 56 N. H. 170.

<sup>122</sup> *Cumber v. Wane*, 1 Strange, 426, 1 Smith, Lead. Cas. 439; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. Rep. 351 (collecting the cases); *Harriman v. Harriman*, 12 Gray (Mass.) 341; *Bailey v. Day*, 26 Me. 88; *Goodwin v. Follett*, 25 Vt. 386; *Day v. Gardner*, 42 N. J. Eq. 190, 7 Atl. Rep. 365; *Jennens v. Lane*, 26 Me. 475; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Barron v. Vandvert*, 13 Ala. 232; *Hayes v. Insurance Co.*, 125 Ill. 626, 18 N. E. Rep. 322; *Harrison v. Close*, 2 Johns. (N. Y.) 448; *Bender v. Been*, 78 Iowa, 283, 43 N. W. Rep. 216; *Rohr v. Anderson*, 51 Md. 205; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169; *Leeson v. Anderson* (Mich.) 58 N. W. Rep. 72; *Bryan v. Fay*, 69 N. C. 45; *Carlton v. Western & A. R. Co.*, 81 Ga. 531, 7 S. E. Rep. 623; *Liening v. Gould*, 13 Cal. 508; *Watts v. Frenche*, 19 N. J. Eq. 407; *St. Louis, etc., R. Co. v. Davis*, 35 Kan. 404, 11 Pac. Rep. 421; *Beaver v. Fulp* (Ind. Sup.) 36 N. E. Rep. 418; *Rea v. Owens*, 37 Iowa, 262; *Longworth v. Hlgham*, 89 Ind. 352; *Lankton v. Stewart*, 27 Minn. 346, 7 N. W. Rep. 360; *Willis v. Gammill*, 67 Mo. 730; *St. Louis, F., S. & W. R. Co. v. Davis*, 35 Kan. 464, 11 Pac. Rep. 421; *Helling v. Order of Honor*, 29 Mo. App. 309; *Reynolds v. Reynolds*, 55 Ark. 369, 18 S. W. Rep. 377; *Emmittsburg R. Co. v. Donoghue*, 67 Md. 383, 10 Atl. Rep. 233; *Tyler v. Association*, 145 Mass. 134, 13 N. E. Rep. 360. And see cases cited in note 120, supra. For the same reason, a promise to take less than the sum due is also without consideration. *McKenzie v. Culbreth*, 66 N. C. 534; *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Rose v. Daniels*, 8 R. I. 381; *Smith v. Phillips*, 77 Va. 548; *Bryan v. Brazil*, 52 Iowa, 350, 3 N. W. Rep. 117. Nor is part payment any consideration for an agreement to extend the time for payment of the residue. *Holliday v. Poole*, 77 Ga. 159; *Liening v. Gould*, 13 Cal. 598; *Barron v. Vandvert*, 13 Ala. 232; *Turnbull v. Brock*, 31 Ohio St. 649. And see post, p. 703.



\$1,000, the payment of which may be demanded at once, a promise by the creditor to take \$500 in full, and its payment, will not prevent his afterwards recovering the other \$500. This rule is well established, but it has been much criticised, and is subject to exceptions, real or apparent. These we will now consider. Before doing so, it will be well to state generally that the exceptions, save in the case of gifts and releases under seal, are all based on the fact that, in addition to the part payment, there is some new benefit or consideration, slight though it may be in many cases, to sustain the creditor's promise to forego the residue of the debt.

*Same—Gift of Residue.*

In the first place, since a person may, if he choose, make a gift to another which, when executed, will be irrevocable, a creditor may, on receiving part of the debt, expressly forgive his debtor the residue.<sup>123</sup>

*Same—Release of Residue under Seal.*

In the second place, in those jurisdictions in which the efficacy of a promise under seal as dispensing with the necessity for a consideration is still recognized, a creditor, on receiving part of his debt, may release the residue by an instrument under seal.<sup>124</sup>

*Same—Consideration for Release of Residue.*

In the third place, the rule that part payment of a debt does not discharge the debtor does not apply where the creditor, in addition to the part payment, receives something else which the law regards of value, or, in other words, where, in the thing done or given, he receives something different in kind from that which he is entitled to demand;<sup>125</sup> and if the difference is real, so that something of value is superadded to the part payment, the fact that the difference or the value superadded is slight will make no difference,

<sup>123</sup> Tyler, etc., Co. v. Chevalier, 56 Ga. 494; Linthicum v. Linthicum, 2 Md. Ch. 21; State v. Story, 57 Miss. 738; Lamprey v. Lamprey, 29 Minn. 151, 12 N. W. Rep. 514; Stafford v. Bacon, 1 Hill. (N. Y.) 532.

<sup>124</sup> Bender v. Sampson, 11 Mass. 42; Willing v. Peters, 12 Serg. & R. (Pa.) 177; Ingersoll v. Martin, 58 Md. 67; Spitze v. Baltimore & O. R. Co., 75 Md. 162, 23 Atl. Rep. 307; Lamprey v. Lamprey, 29 Minn. 151, 12 N. W. Rep. 514.

<sup>125</sup> Jaffray v. Davis, 124 N. Y. 164, 26 N. E. Rep. 351; Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. Rep. 365.

for, as we have seen, the courts will not determine the adequacy of the consideration. If a man sells and becomes bound to deliver to another two particular horses, delivering one of them will not sustain a promise by the buyer not to require delivery of the other; but it would be otherwise if the buyer agreed to receive some other particular horse or a cow in discharge of the contract, though it might be of comparatively little value. A money debt may be discharged by the giving of a negotiable instrument for a less sum than due, or, as said in an old English case, "the gift of a horse, hawk, or robe, etc., in satisfaction, is good; for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction."<sup>136</sup>

If the debtor gives, and the creditor receives, in full satisfaction of the debt, the note of a third person for a smaller sum than the amount of the debt, there is a sufficient consideration for his promise to forego the residue;<sup>137</sup> and so it is where the smaller sum agreed to be taken is guarantied, or a note therefor is indorsed, by a third person;<sup>138</sup> or where the smaller sum is paid before the debt is due, or at a different place than required by the contract;<sup>139</sup> or where a note secured by a mortgage is given for the smaller sum.<sup>140</sup> The rule only applies where the sum due is definite and certain. The payment of a certain sum, if accepted in satisfaction

<sup>136</sup> *Pinnel's Case*, 5 Coke, 117a. And see *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. Rep. 365; *Hasted v. Dodge* (Iowa) 35 N. W. Rep. 462.

<sup>137</sup> *Brooks v. White*, 2 Metc. (Mass.) 283; *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Sanders v. Branch Bank*, 13 Ala. 353; *Hardesty v. Graham* (Ky.) 3 S. W. Rep. 909. Check of third person. *Guild v. Butler*, 127 Mass. 336.

<sup>138</sup> *Steinman v. Magnus*, 11 East, 390; *Singleton v. Thomas*, 73 Ala. 205; *Jenness v. Lane*, 20 Me. 475; *Maddux v. Bevan*, 39 Md., at page 499; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76; *Varney v. Conery*, 77 Me. 527, 1 Atl. Rep. 683; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. Rep. 405.

<sup>139</sup> *Pinnel's Case*, 5 Coke, 117a; *Brooks v. White*, 2 Metc. (Mass.) 283; *Harper v. Graham*, 20 Ohio, 105; *Schweider v. Lang*, 29 Minn. 254, 13 N. W. Rep. 33; *McKenzie v. Culbreth*, 66 N. C. 534; *Jones v. Perkins*, 29 Miss. 139; *Reid v. Hibbard*, 6 Wis. 175.

<sup>140</sup> *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. Rep. 351; *Post v. First Nat. Bank*, 137 Ill. 550, 28 N. E. Rep. 978.

of a larger, but unliquidated, amount, is a good discharge, as there is a benefit in receiving a certain for an uncertain sum.<sup>141</sup>

We have seen that a contract which remains to be performed on both sides may be discharged by mutual consent, the acquittance of each from the other's claims being the consideration of each to waive his own. A contract, however, in which one of the parties has done his part, and the other remains liable, cannot be discharged by mere consent. It may be discharged by the substitution of a new agreement, but in this case the new agreement, as is the case with contracts generally, must be supported by a consideration. If a person who has sold and delivered goods promises to forego half the price due if the vendee will buy other goods or perform some service, there is a consideration for his promise in the promise of the vendee; but there is no consideration for such a promise if the vendee merely agrees to pay or pays half the sum he owes. There must in the new agreement be some benefit to the creditor or some detriment to the debtor. There can be no detriment to the debtor in paying half of what he can be compelled to pay, nor benefit to the creditor in receiving half of what he can legally demand. Unless the creditor receives something different in kind,—a chattel, a negotiable instrument, a fixed for an uncertain sum, a payment at an earlier day, etc.,—his promise to forego is gratuitous, and there must be either a writing under seal to release the residue or an express gift of it to the debtor.

*Same—Compromise.*

We have already seen, in treating of forbearance as a consideration, that where a demand is made and disputed, or a suit is brought, the parties may enter into a compromise, and that the party upon whom the demand is made or against whom the suit

<sup>141</sup> *Wilkinson v. Byers*, 1 Adol. & El. 106; *Baird v. U. S.*, 96 U. S. 430; *Goss v. Ellison*, 136 Mass. 503; *Bull v. Bull*, 43 Conn. 455; *Potter v. Douglass*, 44 Conn. 541; *Brooke v. Waring*, 7 Gill (Md.) 5; *Simmons v. Almy*, 103 Mass. 33; *Riley v. Kershaw*, 52 Mo. 224; *Ogborn v. Hoffman*, 52 Ind. 439; *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. Rep. 231; *Henkle v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 434, 18 N. W. Rep. 275; *Sanford v. Abrams*, 24 Fla. 181, 2 South. Rep. 373; *Berdell v. Bissell*, 6 Colo. 162; *Stearns v. Johnson*, 17 Minn. 142 (Gill. 116); *McCall v. Nave*, 52 Miss. 494.

is brought will be bound thereby. The consideration for his promise is the forbearance of the other party to insist on his original demand, or to further prosecute his action.<sup>142</sup> In such a case the creditor or plaintiff is also bound by the compromise. The settlement of the dispute and definite promise by the debtor is a consideration for his promise to forego any further claim. He cannot disregard the compromise on the ground that the debtor promised only what he was already bound to do.<sup>143</sup>

*Same—Accord and Satisfaction.*

Whether the sum due is certain or uncertain, the consideration for the promise to forego the residue of the debt must be executed. It is not enough that the parties are agreed. Their agreement must be carried out if it is to be an answer to the original cause of action. Where it has been carried out, it is an accord and satisfaction. Where it has not been carried out, it is an accord executory. As said in an old case: "Accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which might go on to any extent."<sup>144</sup> This rule has been criticised, and there are some cases apparently to the contrary.<sup>145</sup> It will be more fully considered in treating of the discharge of contract.

<sup>142</sup> Ante, p. 172.

<sup>143</sup> *Truax v. Miller*, 48 Minn. 62, 50 N. W. Rep. 935; *Sisson v. City of Baltimore*, 51 Md. 83; *Ogborn v. Hoffman*, 52 Ind. 439; *Berdell v. Bissell*, 6 Colo. 162; *McCall v. Nave*, 52 Miss. 494; *Union Pac. R. Co. v. Anderson*, 11 Colo. 293, 18 Pac. Rep. 24; *Perkins v. Headley*, 49 Mo. App. 556; *Gates v. Steele*, 58 Conn. 316, 20 Atl. Rep. 474; *Lesson v. Association*, 8 Misc. Rep. 415, 23 N. Y. Supp. 294; *Sanford v. Abrams*, 24 Fla. 181, 2 South. Rep. 373; *Battle v. McArthur*, 49 Fed. Rep. 715; *North Liberty Market Co. v. Kelley*, 113 U. S. 190, 5 Sup. Ct. Rep. 422; *Slade v. Elevator Co. (Neb.)* 58 N. W. Rep. 191.

<sup>144</sup> *Lynn v. Bruce*, 2 H. Bl. 319. And see *Russell v. Lytle*, 6 Wend. (N. Y.) 390; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 406; *Kromer v. Helm*, 75 N. Y. 574; *Pettis v. Ray*, 12 R. I. 344; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. Rep. 476; *Moorehouse v. Bank*, 98 N. Y. 502; *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. Rep. 243; *Cobb v. Malone*, 86 Ala. 571, 6 South. Rep. 6; *Troutman v. Lucas*, 63 Ga. 406 (by statute); *Ellis v. Bitzer*, 2 Ohio, at page 93; *Frost v. Johnson*, 8 Ohio, 393; *Simmons v. Hamilton*, 56 Cal. 493. Post, p. 703.

<sup>145</sup> *Babcock v. Hawkins*, 23 Vt. 561; *Whitsett v. Clayton*, 5 Colo. 476; *Jones v. Perkins*, 29 Miss. 142; *Heirn v. Carron*, 11 Smedes & M. (Miss.) 361; *Chris-*

*Same—Composition with Creditors.*

A composition with creditors, whereby each creditor agrees to receive a certain proportion of the sum due him, seems, at first thought, to be an infraction of the rule that part payment of a debt is no discharge unless there is some consideration in addition to the part payment for the promise to forego the residue; but it is only apparently so. The promise of the debtor to pay, or payment by him, of a portion of the debt, is not the consideration for the promises of the creditors to forego the balance.<sup>146</sup> The consideration must be and is something more than this. It is the substitution of a new agreement, with new parties and a new consideration. Each creditor enters into a new agreement with the debtor, the consideration of which to the creditor is a forbearance by all the other creditors, who are parties, to insist upon their claims.<sup>147</sup>

*Statutory.*

In North Carolina, and probably in other states, a statute has been enacted providing that an agreement to accept and acceptance of a less sum than the debt due, in satisfaction thereof, shall be a complete discharge of the same.<sup>148</sup>

tie v. Craige, 20 Pa. St. 430; Bradshaw v. Davis, 12 Tex. 336; Billings v. Vanderbeck, 23 Barb. (N. Y.) 546; Schweider v. Lang, 29 Minn. 254, 13 N. W. Rep. 33.

<sup>146</sup> Fitch v. Sutton, 5 East, 230.

<sup>147</sup> Good v. Cheesman, 2 Barn. & Adol. 335; Perkins v. Lockwood, 100 Mass. 250; Eaton v. Lincoln, 13 Mass. 424; Bigelow v. Baldwin, 1 Gray (Mass.) 245; Fellows v. Stevens, 24 Wend. 294; Murray v. Snow, 37 Iowa, 410; Cheveront v. Textor, 53 Md. 295, 307; Falconbury v. Kendall, 76 Ind. 260; Robert v. Barnum, 80 Ky. 28; Pierce v. Jones, 8 Rich. Law (S. C.) 273; Brown v. Farnham, 48 Minn. 317, 51 N. W. Rep. 377; Paddleford v. Thacher, 48 Vt. 574; Boyd v. Hind, 1 Hurl. & N. 938; Slater v. Jones, L. R. 8 Exch. 193.

<sup>148</sup> Tiddy v. Harris, 101 N. C. 589, 8 S. E. Rep. 227; Jones v. Wilson, 104 N. C. 9, 10 S. E. Rep. 79.

### LEGALITY OF CONSIDERATION.

**89. The consideration, to support a promise, must be legal; and therefore a promise to do or doing what is illegal is no consideration.<sup>140</sup>**

It is well to state this rule here, as indicating a necessary element in consideration; but, inasmuch as the consideration for a promise is the object for which one of the parties makes the contract, the legality of consideration must form a part of a subsequent discussion. It will be treated when we come to consider, as an element in the formation of contract, the legality of the objects for which the parties to a contract enter into it.

### CONSIDERATION IN RESPECT OF TIME.

**90. Consideration, in its relation to the promise in respect of time, may be—**

- (a) Executory; that is, where it is a promise given for a promise.**
- (b) Executed; that is, where it is an act or forbearance given for a promise, the act or forbearance constituting at once the proposal or acceptance, and the consideration for the promise given in respect of it.**
- (c) Past; that is, an act or forbearance in the past, prompting, from a mere sense of gratitude or honor, a return for the benefits received.**

We come now to deal with the relation of the consideration to the promise in respect of time. We have already, in treating of offer and acceptance, incidentally explained what is meant by executory and executed consideration, but it is necessary to consider the matter again in reference particularly to the doctrine of consideration. The consideration for a promise may be executory or

<sup>140</sup> *Bishop v. Palmer*, 148 Mass. 469, 16 N. E. Rep. 299; *Hatch v. Mann*, 15 Wend. (N. Y.) 45; *Hartley v. Rice*, 10 East, 22. See post, pp. 374 et seq.

executed, in which cases it is respectively future or present, or it may be past.

*Executory Consideration.*

The consideration for a promise is executory when it is a promise given in return to do something in the future. In regard to this, there is nothing to be added to what has already been said with regard to the nature of consideration in general. We have seen that a promise on one side is a good consideration for a promise on the other, as in case of mutual promises to marry.

*Executed Consideration.*

A contract arises upon an executed consideration when one of the parties has either in the act which amounts to a proposal or to an acceptance, as the case may be, done all that he is bound to do under the contract, leaving an outstanding liability on the other side only. The two forms of consideration thus suggested have been described as (1) acceptance of an executed consideration, and (2) consideration executed upon request.<sup>150</sup> They arise when the proposal is an offer of an act for a promise, and the act is accepted; or where it is an offer of a promise for an act, and the act is done.

In the first case a man offers his labor or goods under such circumstances that he obviously expects to be paid for them, and the contract arises when the labor or goods are accepted, the acceptor becoming bound to pay a reasonable price for them.<sup>151</sup> It must, however, be borne in mind, as already shown in treating of offer and acceptance, that, where the person to whom an offer is made has no opportunity of accepting or rejecting the things offered, an acceptance which he cannot help will not bind him.<sup>152</sup> The consideration executed upon request, or the contract which arises on the acceptance by act of the offer of a promise, is best illustrated by the case of an advertisement of a reward for services, which makes a binding promise to give the reward when the service is rendered. Under these circumstances, it is not the offerer, but the acceptor, who has done his part in becoming a party to the contract.<sup>153</sup> This

<sup>150</sup> Leake, Cont. 23.

<sup>151</sup> Ante, p. 25; *Hoadley v. McLaine*, 10 Bing. 482; *Hart v. Mills*, 15 Mees. & W. 87.

<sup>152</sup> Ante, p. 30.

<sup>153</sup> Ante, pp. 25, 55; *England v. Davidson*, 11 Adol. & El. 850.

form of consideration will support an implied as well as an express promise where a man is asked to perform certain services which will entail certain liabilities and expenses. Thus, where a person is employed to deal with property for a certain purpose, and, in the course of the employment, he is compelled to pay duties to the government, he may recover the amount from his employer on an implied promise to repay. As said by the court in a case of this sort, "whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference."<sup>154</sup>

The term "executed," as applied to consideration, is often used to designate a consideration that is past when the promise is made, but this use of the term can only tend to confuse.

#### SAME—PAST CONSIDERATION.

**91. A consideration may be executory or executed, but it cannot be past, except—**

**EXCEPTIONS—(a) Where the past consideration was given at the request of the promisor.**

**(b) Where the promise is to pay for something voluntarily done by the promisee, which the promisor was legally bound to do.**

**(c) Where a person, by a new promise, revives an agreement by which he has benefited, but which is not void, but voidable or unenforceable against him, by reason of—**

- (1) Rules of law since repealed;**
- (2) Incapacity to contract since removed;**
- (3) Lapse of time barring its enforcement;**
- (4) Or other technical rules of law meant for his advantage and which he may waive.**

It remains now to distinguish executed or present consideration from consideration that is past. Strictly, it is a misnomer to speak of a past "consideration," for it is in fact no consideration at

<sup>154</sup> *Brittain v. Lloyd*, 14 Mees. & W. 762.



all. A past consideration, so called, is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If, afterwards, whether from good feeling or interested motives it matters not, he makes a promise to the person by whom he has been so benefited, and that promise is made upon no other consideration than the past benefit, the promise is gratuitous, and, if not under seal, it cannot be enforced.<sup>156</sup> Thus, where a person who had previously sold a vicious horse without any warranty, either express or implied, afterwards promised that it was sound and free from vice, it was held that the promise was not binding for want of consideration.<sup>157</sup> So, also, it has repeatedly been held that services rendered in the past, but not at the express or implied request of the person benefited by them, will not support a promise by him to pay for them.<sup>158</sup> In a Michigan case in which liquor had been sold in violation of a statute, which was afterwards repealed, the court held that, as the contract was void, a promise by the buyer to pay, made after the statute was repealed, in consideration of the sale and of an extension of the time for payment originally agreed upon, was without consideration.<sup>159</sup> So, where the balance of a debt has been voluntarily and effectually released

<sup>156</sup> Anson, Cont. 92; *Hunt v. Bate* (1568) Dyer, 272; *Lampleigh v. Braithwaite*, Hob. 105, 1 Smith, Lead. Cas. 67; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Bulkley v. Landon*, 2 Conn. 404; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *Greene v. First Parish in Malden*, 10 Pick. (Mass.) 500; *Williams v. Hathaway*, 19 Pick. (Mass.) 387; *Wilson v. Edmonds*, 24 N. H. 517; *Osler v. Hobbs*, 33 Ark. 215. Some of the earlier cases sustained, and many late cases seem to sustain, promises on a past consideration on the ground of moral obligation. *Barnes v. Hedley*, 2 Taunt. 184; *Lee v. Muggeridge*, 5 Taunt. 36. See post, p. 203. One who signs a note after its date and delivery by the original maker, where there is no extension of time, nor promise of forbearance, is not bound thereby. *Leverone v. Hildreth*, 80 Cal. 139, 22 Pac. Rep. 72.

<sup>157</sup> *Roscorla v. Thomas*, 3 Q. B. 234.

<sup>158</sup> *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Allen v. Bryson*, 67 Iowa, 591, 25 N. W. Rep. 820; *Osler v. Hobbs*, 33 Ark. 215; *Ellicott v. Peterson*, 4 Md. 476.

<sup>159</sup> *Ludlow v. Hardy*, 38 Mich. 690.

on payment of a part of it, a subsequent promise by the debtor to pay the part released cannot be enforced.<sup>189</sup>

*Exceptions to the Rule as to Past Consideration.*

To the general rule that a past consideration will not support a promise, there are exceptions:

(1) A past consideration will support a subsequent promise if the consideration was given at the request of the promisor. In the leading case on this point the plaintiff sued for money which the defendant had promised to pay him for services rendered previous to the promise, at the defendant's request, but without any promise at the time of the request, and of the rendition of the services. The court agreed "that a mere voluntary courtesy will not have consideration to uphold an assumpsit. But, if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit."<sup>190</sup> Some cases even go so far as to say that,

<sup>189</sup> *Hale v. Rice*, 124 Mass. 299; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. Rep. 405; *Montgomery v. Lampton*, 3 Metc. (Ky.) 519; *Shepard v. Rhodes*, 7 R. I. 470; *Stafford v. Bacon*, 1 Hill (N. Y.) 532. But see *Willing v. Peters*, 12 Serg. & R. (Pa.) 177.

<sup>190</sup> *Lampleigh v. Braithwait* (A. D. 1615) Hob. 105, 1 Smith, Lead. Cas. 67. And see *Wilkinson v. Oliveira*, 1 Bing. N. C. 490; *Bradford v. Roulston*, 8 Ir. C. L. 468; *Boothe v. Fitzpatrick*, 36 Vt. 681; *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *Pool v. Horner*, 64 Md. 131, 20 Atl. Rep. 1036; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Comstock v. Smith*, 7 Johns. (N. Y.) 87; *Allen v. Woodward*, 22 N. H. 544; *Goldsby v. Robertson*, 1 Blackf. (Ind.) 247; *Carson v. Clark*, 2 Ill. 113; *Lonsdale v. Brown*, 4 Wash. C. C. 148, Fed. Cas. No. 8494; *Wilson v. Edmonds*, 24 N. H. 517; *Sidenham v. Worlington* (1585) 2 Leon. 224; *Marsh v. Rainsford* (1588) 2 Leon. 111; *Riggs v. Bullingham* (1599) Cro. Eliz. 715; *Bosden v. Sir John Thenne* (1603) Yelv. 40; *Field v. Dale*, 1 Rolle, Abr. 11. The previous request may be inferred from the beneficial character of the services, or other consideration, and the other circumstances. *Hicks v. Burhans*, 10 Johns. (N. Y.) 243; *Oatfield v. Waring*, 14 Johns. (N. Y.) 188; *Wilson v. Edmonds*, 24 N. H. 517. Liability incurred by a commission merchant, or probably by any other agent, under valid transactions for his principal, is sufficient to support a note given him by the principal for the amount of such liability. *Powell v. McCord*, 121 Ill. 330, 12 N. E. Rep. 262. The rule laid down in *Lampleigh v. Braithwait* was literally adhered to in England in a comparatively late case. *Bradford v. Roulston*, 8 Ir. C.

even though the past consideration was rendered without request, yet, if it moved directly from the promisee to the promisor, and inured directly to the promisor's benefit, the subsequent promise is binding;<sup>161</sup> but these cases are doubtful, unless they can be sustained on the ground that the retention of a benefit or the ratification of an unauthorized act may be equivalent to a request.<sup>162</sup> It has been held that if the past consideration, though rendered at the request of the other party, was intended by both parties to be gratuitous, the subsequent promise to pay therefor is not supported by a consideration.<sup>163</sup>

(2) There is another exception, or possible exception, to the rule in cases where one person has voluntarily done what another person was legally bound to do, and the latter afterwards promises to pay him therefor. The English cases usually cited in support of this rule all turned upon the liability of parish authorities for medical attendance upon paupers who were settled in one parish, but resident in another. It was held in all the cases that a suit could be maintained for services rendered against the parish legally bound to render them, and which had, after their rendition, promised to pay for them. Some of the cases seem to base the decision on the ground that the moral obligation resting on the parish was

L. 468. Sir William Anson, however, after a review of the dicta of a number of English cases decided in the interval between these two, argues that the rule laid down in the latter, and in the text-books generally, is too broad. He claims that the true rule amounts to this: that where a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum is either to be regarded as part of the same transaction, or as evidence to assist the jury in determining what would be a reasonable sum as on a promise implied from the original request. And he states that unless the request is virtually the offer of a promise, the precise extent of which is hereafter to be ascertained, or is so clearly made in contemplation of a promise to be given by the maker of the request that a subsequent promise may be regarded as a part of the same transaction, the rule in *Lampleigh v. Braithwait* has no application. Anson, Cont. 93-97.

<sup>161</sup> *Boothe v. Fitzpatrick*, 86 Vt. 681; *Seymour v. Town of Marlboro*, 40 Vt. 171; *Doty v. Wilson*, 14 Johns. (N. Y.) 378.

<sup>162</sup> Post, p. 200, note 168.

<sup>163</sup> *Allen v. Bryson*, 67 Iowa, 591, 25 N. W. Rep. 820; *Osier v. Hobbs*, 33 Ark. 215.

sufficient to support its promise;<sup>184</sup> but, as we have seen, moral obligations cannot form a consideration.<sup>185</sup> Other cases seem to go on the ground that there was a legal obligation resting on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that a quasi contractual relation thus arose between the parties; or that there was knowledge on the part of the defendant parish or acts from which a contract might be implied, independent of the subsequent promise.<sup>186</sup> There is, to say the least, some doubt in regard to this exception.<sup>187</sup> In a Massachusetts case, however, in which the plaintiff had, without a prior request, paid money which the defendant was legally bound to pay, the court held that a subsequent promise by the defendant to reimburse him was "equivalent to a previous request," on "the well-established principle that the subsequent ratification of an act done by a voluntary agent of another, without authority from him, is equivalent to a previous authority."<sup>188</sup>

(3) The third exception to the rule that a past consideration will not support a promise is a substantial and important one, and one about which there is no doubt. It is found in those cases in which a person has been held capable of reviving an agreement by which he has benefited, but which, (a) by rules of law since repealed, (b) by incapacity to contract since removed, (c) by mere lapse of time, or (d) by other technical rules of law meant for his advantage, and which he may waive, is not enforceable against him. The principle upon which these cases rest is "that, where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law, and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform

<sup>184</sup> *Watson v. Turner*, Bull. N. P. 147; *Atkins v. Banwell*, 2 East, 505; *Wing v. Mill*, 1 Barn. & Ald. 105.

<sup>185</sup> *Ante*, p. 180; *Mills v. Wyman*, 3 Pick. (Mass.) 207.

<sup>186</sup> *Paynter v. Williams*, 1 Crompt. & M. 810.

<sup>187</sup> *Anson*, Cont. 97-99.

<sup>188</sup> *Gleason v. Dyke*, 22 Pick. (Mass.) 390. And see *Doty v. Wilson*, 14 Johns. (N. Y.) 382.

it."<sup>169</sup> Thus, where bills, void for usury, were renewed after the usury laws had been repealed, the consideration for the renewal being the past loan, it was held that they were valid.<sup>170</sup> So, also, a new promise made by a bankrupt or insolvent who has been discharged from debts by a certificate of bankruptcy, or by insolvency proceedings, to pay a debt, has been upheld without further consideration;<sup>171</sup> and a promise by a person, after becoming of age, to pay debts contracted during infancy, and which could not be enforced, is binding on him.<sup>172</sup> Some courts have held that a promise by a woman during widowhood or after divorce, to fulfill promises made during coverture, is binding;<sup>173</sup> but most courts hold that as a married woman's contract, unlike an infant's, is void, and

<sup>169</sup> Parke, B., in *Earle v. Oliver*, 2 Exch. 71; *Shepard v. Rhodes*, 7 R. I. 470; *Turlington v. Slaughter*, 54 Ala. 195; *Lonsdale v. Brown*, 4 Wash. C. C. 86, Fed. Cas. No. 8,493. Promise by the owner of a building to pay for materials furnished by a contractor who has failed to comply with the mechanic's lien law. *Morse v. Crate*, 43 Ill. App. 513.

<sup>170</sup> *Flight v. Reed*, 1 Hurl. & C. 703; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505. See *Barnes v. Hedley*, 2 Taunt. 184.

<sup>171</sup> *Trueman v. Fenton*, Cowp. 544; *Dusenberry v. Hoyt*, 53 N. Y. 521; *Way v. Sperry*, 6 Cush. (Mass.) 238; *Maxim v. Morse*, 8 Mass. 127; *Shippey v. Henderson*, 14 Johns. (N. Y.) 178; *Yates v. Hollingsworth*, 5 Har. & J. (Md.) 216; *Hubbard v. Farrell*, 87 Ind. 215; *Katz v. Moessinger*, 110 Ill. 372; *Edwards v. Nelson*, 51 Mich. 121, 16 N. W. Rep. 261; *Shaw v. Burney*, 86 N. C. 331; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. Rep. 837; *Wolfe v. Eberlein*, 74 Ala. 99; *Carey v. Hess*, 112 Ind. 398, 14 N. E. Rep. 235; *Hunt v. Jones*, 1 Ind. App. 545, 28 N. E. Rep. 98; *Knapp v. Hoyt*, 57 Iowa, 591, 10 N. W. Rep. 925; *Griel v. Solomon*, 82 Ala. 85, 2 South. Rep. 322; *Hobough v. Murphy*, 114 Pa. St. 358, 7 Atl. Rep. 139; *Murphy v. Crawford*, 114 Pa. St. 406, 7 Atl. Rep. 142; *Craig v. Seitz*, 63 Mich. 727, 30 N. W. Rep. 347; *Succession of Audrieu*, 44 La. Ann. 103, 10 South. Rep. 388; *Bridgman v. Christie* (N. J. Ch.) 25 Atl. Rep. 939; *Higgins v. Dale*, 28 Minn. 126, 9 N. W. Rep. 583. But not if debt is voluntarily released. *Stafford v. Bacon*, 1 Hill (N. Y.) 532. See ante, p. 198. Promise by third person to pay discharged debt. *Webster v. Le Compte*, 74 Md. 249, 22 Atl. Rep. 232.

<sup>172</sup> *Williams v. Moor*, 11 Mees. & W. 263; *Tibbetts v. Gerrish*, 25 N. H. 41; *Bliss v. Perryman*, 1 Scam. (Ill.) 434; *Reed v. Batchelder*, 1 Metc. (Mass.) 559; *Kendrick v. Niesz* (Colo.) 30 Pac. Rep. 245; *Heady v. Boden* (Ind.) 30 N. E. Rep. 1119; *Edmond's Case* (1586) 3 Leon. 164.

<sup>173</sup> *Lee v. Muggeridge*, 5 Taunt. 36 (this was on the ground of moral obligation); *Brown v. Bennett*, 75 Pa. St. 420; *Sharpless' Appeal*, 140 Pa. St. 63, 21 Atl. Rep. 239; *Goulding v. Davidson*, 26 N. Y. 604.

not merely voidable, her new promise after the death of her husband, or after a divorce has been obtained, is without consideration.<sup>174</sup> So, also, a debt barred by the statute of limitations may be revived by a new promise to pay it, and the new promise may be implied from a mere acknowledgment of the debt;<sup>175</sup> and an indorser on a note, who has been discharged from liability from want of notice of nonpayment, may waive his discharge.<sup>176</sup> There are certain features common to these cases. Each, in its origin, presents the essential elements of agreement, and in each of them one of the parties has gotten all that he bargained for. The other party cannot obtain what he was promised, either because he made an agreement with one who was incapable of contracting, or because a technical rule of law forbids the agreement to be enforced. If the party who has received the benefit which he expected from the agreement afterwards acquires the capacity to contract, or if the rule of law is repealed, as in case of the statute against usury, or, as in case of the statute of limitations, admits of a waiver by the person whom it protects, then a new promise, based upon the consideration already received, is binding.<sup>177</sup>

There is undoubtedly in all of these cases a moral obligation to fulfill the unenforceable promise, and many of the decisions, both old and modern, base the validity of the new promise on the ground of

<sup>174</sup> *Hayward v. Barker*, 52 Vt. 429; *Porterfield v. Butler*, 47 Miss. 165; *Leyd v. Lee*, 1 Strange, 94; *Meyer v. Howarth*, 8 Adol. & El. 467; *Waters v. Bean*, 15 Ga. 358; *Putnam v. Tennyson*, 50 Ind. 456; *Musick v. Dodson*, 76 Mo. 624; *Kent v. Rand*, 64 N. H. 45, 5 Atl. Rep. 760; *Valentine v. Bell* (Vt.) 29 Atl. Rep. 251. A promise by a married woman, having a separate estate, to pay for necessities furnished her on the credit of such estate, is a sufficient consideration for a new promise after the death of her husband. *Sherwin v. Sanders*, 59 Vt. 490, 9 Atl. Rep. 239.

<sup>175</sup> *Isley v. Jewett*, 3 Metc. (Mass.) 439; *Keener v. Crull*, 19 Ill. 189; *Walker v. Henry*, 30 W. Va. 100, 14 S. E. Rep. 440; *Little v. Blunt*, 9 Pick. (Mass.) 488; *Pitman v. Elder*, 76 Ga. 371; *Pierce v. Wimberly*, 78 Tex. 187, 14 S. W. Rep. 454; *Shipley v. Shilling*, 66 Md. 558, 8 Atl. Rep. 355; *Hall v. Bryan*, 50 Md. 194. But see *Peterson v. Breitag* (Iowa) 55 N. W. Rep. 86; *Stephenson v. Line*, 7 Ohio Cir. Ct. R. 147. But a deceased person's debt which is barred will not support his widow's promise to pay it. *Sullivan v. Sullivan*, 99 Cal. 187, 83 Pac. Rep. 862.

<sup>176</sup> *Ross v. Hurd*, 71 N. Y. 14.

<sup>177</sup> *Anson*, Cont. 101.

the moral obligation, thereby making this class of cases an exception to the rule that a moral obligation cannot support a promise.<sup>178</sup> If the effect of these cases is to make such an exception, it is unfortunate, to say the least, for there is much dicta to the effect that a moral obligation can never support a promise.<sup>179</sup> It would seem much better to base the validity of such promises, not on the moral obligation, but on the prior agreement, supported by a valuable consideration, and the right of the promisor to waive the technical rules of law, meant for his benefit, and which render it unenforceable.

### FAILURE OF CONSIDERATION.

92. Where the consideration for a promise wholly fails, the promise is without consideration and void.

93. Partial failure of consideration will render a promise void pro tanto, if the promise and consideration are divisible, so that the appropriate part of the promise can be apportioned to the part of the consideration that has failed.

If it turns out that the matter of the consideration for a promise, unknown to the parties, did not in fact exist, so that there was in reality no consideration, this is a failure of consideration, and renders the promise void.<sup>180</sup> For instance, where land is sold, and notes are given for the purchase money, and it turns out that the vendor had no title, or no title passes, the notes are without

<sup>178</sup> *Edmond's Case* (1586) 3 Leon. 164; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. Rep. 837; *Turlington v. Slaughter*, 54 Ala. 195; *Musick v. Dodson*, 76 Mo. 624; *Carey v. Hess*, 1 Ind. App. 545, 14 N. E. Rep. 235; *Hobough v. Murphy*, 114 Pa. St. 358, 7 Atl. Rep. 139; *Murphy v. Crawford*, 114 Pa. St. 496, 7 Atl. Rep. 142; *Craig v. Seitz*, 63 Mich. 727, 30 N. W. Rep. 347; *Succession of Audrieu*, 44 La. Ann. 103, 10 South. Rep. 388. See post, p. 439. As to recovery quasi ex contractu on failure of consideration, see post, p. 774.

<sup>179</sup> *Mills v. Wyman*, 3 Pick. (Mass.) 207. And see ante, p. 180 et seq., and cases cited.

<sup>180</sup> *Rice v. Goddard*, 14 Pick. (Mass.) 293; *Gibson v. Pelkie*, 37 Mich. 380; *Montelino v. Wood*, 56 Iowa, 254, 9 N. W. Rep. 212; *Jeffries v. Lamb*, 73 Ind. 202; *State v. Illyes*, 87 Ind. 405; *Powell v. Subers*, 67 Ga. 443; *Hopkins v. Hinkley*, 61 Md. 584.

consideration and void.<sup>181</sup> So, also, where personal property is sold by one who has no title to it, the vendee's promise to pay the purchase money cannot be enforced against him;<sup>182</sup> and, in like manner, a promise in consideration of the sale of personal property which, unknown to the parties, does not exist at the time of the sale,<sup>183</sup> or contrary to the representation or warranty of the seller, is worthless,<sup>184</sup> is void. Where a person holding the note of two persons took in renewal a note, purporting to be signed by the same parties, but which was in fact a forgery as to one of them, he was allowed to sue on the original note, on the ground that there was no consideration for its surrender.<sup>185</sup>

In the case of the sale of land with covenants by the vendor, questions have arisen as to whether the failure of the title amounts to a total failure of consideration. In a Massachusetts case a note had been given in consideration of a conveyance of land by deed, with the usual covenants of seisin and warranty, and the title to the land failed entirely. The question raised was whether that want of title was an entire want of consideration for the note, so as to render it nudum pactum, or whether the covenants in the deed were of themselves a sufficient consideration. It was held, contrary to a decision in Maine,<sup>186</sup> that the total failure of title was a total failure of consideration, and that the note was therefore void. "The promise is not made for a promise," it was said, "but

<sup>181</sup> *Murphy v. Jones*, 7 Ind. 529; *Anderson v. Armstead*, 69 Ill. 452; *Ferguson v. Teel*, 82 Va. 690; *Curtis v. Clark*, 133 Mass. 509; *Baird v. Laevison*, 91 Ky. 204, 15 S. W. Rep. 252; *Redding v. Lamb*, 81 Mich. 318, 45 N. W. Rep. 997; *Stockham v. Cheney*, 62 Mich. 10, 28 N. W. Rep. 692; *Hall v. McArthur*, 82 Ga. 572, 9 S. E. Rep. 534; *West v. Shaw*, 32 W. Va. 195, 9 S. E. Rep. 81.

<sup>182</sup> *Button v. Trader*, 75 Mich. 295, 42 N. W. Rep. 834. Where, however, the person claiming title elects to sue the vendor and garnish the vendee, he ratifies the sale, and is estopped to dispute the vendor's title, and the vendee's promise will in such case be binding. *Id.*

<sup>183</sup> *Sale of void patent. Bierce v. Stocking*, 11 Gray (Mass.) 174; *Dickinson v. Hall*, 14 Pick. (Mass.) 217; *Cross v. Huntley*, 13 Wend. (N. Y.) 385; *Gelger v. Cook*, 3 Watts & S. (Pa.) 266; *First Nat. Bank v. Peck*, 8 Kan. 660; *Clough v. Patrick*, 37 Vt. 421.

<sup>184</sup> *Thompson v. Manufacturing Co.*, 29 Kan. 476; *Cochran v. Jones*, 85 Ga. 678, 11 S. E. Rep. 811; *Stevens v. Johnson*, 28 Minn. 172, 9 N. W. Rep. 677.

<sup>185</sup> *Stratton v. McMakin*, 84 Ky. 641.

<sup>186</sup> *Jenness v. Parker*, 24 Me. 289; *Lloyd v. Jewell*, 1 Greenl. (Me.) 360.



for the land. The moving cause is the estate, and, if that fails to pass, the promise is a mere nudum pactum."<sup>187</sup>

*Partial Failure of Consideration.*

There may also be a partial failure of consideration, which under some, but not all, circumstances may render the promise void pro tanto. If the contract is indivisible, and a substantial consideration is left, although much diminished, it will still suffice to sustain the contract, for, as we have seen, the courts do not as a rule regard the amount of the consideration; but, if the consideration and the agreement founded upon it both consisted of several parts, and a part of the consideration failed, and the appropriate part of the agreement can be apportioned to it, then the several parts may be treated as several contracts, and the contract be avoided pro tanto.<sup>188</sup> Where, for instance, half the price of land was paid in cash, and a note was given for the balance, it was held that failure of title to more than half the land was a defense to the note.<sup>189</sup>

*Misapprehension Necessary.*

In order that a promise may be avoided on the ground of failure of consideration, there must have been a misapprehension as to the matter of the consideration. If the matter of the consideration is just what the parties supposed it to be, and can be said to furnish any consideration at all, there is no failure of consideration.<sup>190</sup> If

<sup>187</sup> *Rice v. Goddard*, 14 Pick. (Mass.) 293. And see *Frisbee v. Hoffnagle*, 11 Johns. (N. Y.) 50; *McAllister v. Reab*, 4 Wend. (N. Y.) 483; *Durment v. Tuttle*, 50 Minn. 426, 52 N. W. Rep. 909; *Steinhauer v. Witman*, 1 Serg. & R. (Pa.) 447; *Gray v. Handkinson*, 1 Bay, 278; *Bell v. Huggins*, Id. 327; *Trask v. Vinson*, 20 Pick. (Mass.) 110; *Chandler v. Marsh*, 3 Vt. 162; *Cook v. Mix*, 11 Conn. 432; *Tillotson v. Grapes*, 4 N. H. 448; *Tyler v. Young*, 2 Scam. (Ill.) 447; *Davis v. McVickers*, 11 Ill. 327. But see *Sunderland v. Bell*, 39 Kan. 21, 17 Pac. Rep. 600.

<sup>188</sup> 1 Para. Cont. 462. See *Brown v. Weldon*, 99 Mo. 564, 13 S. W. Rep. 342; *Sentman v. Gamble*, 69 Md. 293, 13 Atl. Rep. 58, and 14 Atl. Rep. 673; *Stevens v. Johnson*, 28 Minn. 172, 9 N. W. Rep. 677; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Torinus v. Buckam*, 29 Minn. 128, 12 N. W. Rep. 348. This question will be more fully considered in a subsequent chapter.

<sup>189</sup> *Durment v. Tuttle*, 50 Minn. 426, 52 N. W. Rep. 909.

<sup>190</sup> *Fay v. Richards*, 21 Wend. (N. Y.) 626; *Hargh v. Brooks*, 10 Adol. & El. 309; ante, p. 161; *Ellis v. Adderton*, 88 N. C. 472; *Foy v. Houghton*, 85 N. C. 168; *Kerr v. Lucas*, 1 Allen (Mass.) 279.

goods are sold without a warranty, the buyer cannot refuse to pay the price on the ground that they are not of the quality or value that he supposed them to be. So, if bonds of a private or municipal corporation are sold without a warranty, the purchaser, according to some cases, is liable on his promise to pay for them, though it may turn out that they were invalid, because the corporation had no authority to issue them or failed to comply with the law in their issuance. The buyer gets exactly what he bargained for, and assumes the risk of the bonds proving invalid.<sup>191</sup> Of course, if there is a warranty, express or implied, it is different; and there is high authority for the statement that a person who sells a bond or other instrument impliedly warrants its validity.<sup>192</sup> So, also, in the absence of fraud, the buyer is liable for the price agreed to be paid for worthless stock of a corporation, where he receives that for which he contracted, though it was known by the seller to be worthless.<sup>193</sup>

*Subsequent Failure of Executed Consideration.*

The failure of an executed consideration must fail as of the time of the contract, or, at least, as of the time it was executed, where it was furnished after the contract was made. If the promisor receives a consideration for his promise, the fact that it subsequently diminishes in value, or even wholly fails, does not release him from liability on his promise.<sup>194</sup> The transfer and delivery of a note, for instance, by the payee to the maker of another note, in exchange therefor, is a valuable consideration for the latter note, and the fact that the former note subsequently becomes worthless does not constitute a failure of consideration.<sup>195</sup> So, if a patent is sold, the fact

<sup>191</sup> *Otis v. Cullum*, 92 U. S. 447; *Harvey v. Dale*, 96 Cal. 160, 31 Pac. Rep. 14; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. Rep. 98. But see *Hurd v. Hall*, 12 Wis. 136; and the dissenting opinion of Garoutte, J., in *Sutro v. Rhodes*, *supra*.

<sup>192</sup> *Young v. Cole*, 3 Bing. N. C. 724.

<sup>193</sup> *Hunting v. Downer*, 151 Mass. 275, 23 N. E. Rep. 832.

<sup>194</sup> *Rice v. Grange*, 131 N. Y. 149, 30 N. E. Rep. 46; *Harmon v. Bird*, 22 Wend. (N. Y.) 113; *Perry v. Buckman*, 33 Vt. 7; *Potter v. Earnest*, 45 Ind. 416; *Smock v. Pierson*, 68 Ind. 405; *Blackman v. Dowling*, 63 Ala. 304; *Byrne v. Cummings*, 41 Miss. 192; *Daniel v. Tarver*, 70 Ga. 203; *Dowdy v. McLellan*, 52 Ga. 408; *Bean v. Proseus* (Cal.) 31 Pac. Rep. 49; *Topp v. White*, 12 Helsk. (Tenn.) 165.

<sup>195</sup> *Rice v. Grange*, 131 N. Y. 149, 30 N. E. Rep. 46.

that it afterwards becomes valueless because of improvements does not release the purchaser from liability for the purchase money.<sup>106</sup>

*Recovery of Money Paid.*

Ordinarily, if a person voluntarily pays another money, he cannot maintain an action to recover it back. This rule, however, does not apply where money is paid under a contract, and the consideration fails. The money may be recovered back in such a case.<sup>107</sup>

*Mistake—Conditions—Warranties.*

When we come to treat of the reality of the consent of the parties to a contract, we shall see that a contract is void if the subject-matter, unknown to the parties, was not in existence at the time of the contract. The invalidity of the contract is usually put upon the ground of mistake. Sometimes the ground is said to be failure of consideration. There is, however, a distinction between mistake and failure of consideration. Mistake, as we shall see, prevents a contract from being formed at all. Failure of consideration, on the other hand, implies the existence of a contract. This distinction may become important where the rights of third persons are concerned.

Failure of consideration must also be understood in connection with the terms "condition precedent" and "warranty." In contracts with an executory consideration, if the performance or fulfillment of the consideration forms a condition precedent to the liability under the contract, the failure of the consideration—that is, the failure to fulfill or perform it—prevents any liability from attaching. This will be considered in a subsequent chapter. If the performance or fulfillment of the consideration does not form a condition precedent to the liability under the contract, but consists of an independent promise or warranty, the failure in the performance of the consideration does not affect the liability on the other side, and has the effect only of a breach of the contract, giving a right of action for damages, which may be recovered in an action directly against the other party, or by counterclaim in an action brought by him on the contract.<sup>108</sup> This, also, will be considered in a subsequent chapter.

<sup>106</sup> *Harmon v. Bird*, 22 Wend. (N. Y.) 113.

<sup>107</sup> *Steele v. Hobbs*, 16 Ill. 59; *Darst v. Brockway*, 11 Ohio, 462; *Foss v. Richardson*, 15 Gray (Mass.) 303; *Chapman v. City of Brooklyn*, 40 N. Y. 372; *Leach v. Tilton*, 40 N. H. 473.

<sup>108</sup> *Leake*, Cont. 323.

*Exceptions.*

Failure of consideration is in fact and in effect want of consideration. What has been said, therefore, in treating of the necessity for a consideration, applies here. In those jurisdictions in which a consideration is not necessary where the contract is under seal, failure of consideration cannot be shown to defeat a contract under seal; and failure of consideration cannot be pleaded as a defense to a negotiable instrument in the hands of a purchaser thereof for value and without notice.

## CHAPTER VI.

### CAPACITY OF PARTIES.

- 94-95. In General.
- 96-98. Political Status—States and United States.
- 99. Foreign States and Sovereigns.
- 100-103. Aliens.
- 104-105. Convicts.
- 106. Professional Status.
- 107-112. Infants—In General.
- 113-117. Contracts for Necessaries.
- 118-119. Ratification and Avoidance.
- 120-122. Who may Avoid Contract.
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- 130. Extent of Ratification or Disaffirmance.
- 131-132. Return of Consideration.
- 133. Effect of Ratification.
- 134-136. Effect of Disaffirmance.
- 137-139. Torts in Connection with Contracts.
- 140-141. Insane Persons—In General.
- 142-145. Ratification and Avoidance.
- 146-147. Drunken Persons.
- 148. Married Women.
- 149-154. Corporations.

Thus far we have been dealing with the contract itself, and those elements in its formation which are essential to give it even a *prima facie* validity. Communication by offer and acceptance, and form or consideration, or, in some cases, both form and consideration, are necessary to every agreement that is to be considered by courts of law; but this is not all. When we have constructed an apparently binding contract, it is necessary, before we can pronounce finally upon its validity, to look to the parties to it, and ask who made it, under what circumstances, and with what object. In other words, we have to inquire whether the parties were capable of contracting, whether their apparent consent was genuine, and whether their object was legal. First we will consider the question of the capacity of the parties; but before doing so it will

be well to call attention to certain matters generally, but somewhat illogically, treated in this connection.

*Two Parties Necessary.*

We have already seen that there can be neither agreement nor obligation, and therefore no contract, unless there are at least two parties; that a person cannot make a contract with himself.<sup>1</sup> This is a matter which goes to the very nature of contract as a legal conception, and has no place in this connection.

*Contracts through Agents.*

A man, as we shall presently see at some length, may employ or authorize another to represent him in the formation of contracts. This representation is called "agency." Many writers treat of this branch of the law of contract under the head of "Parties," which may be proper; while some treat of it under the head of "Capacity of Parties," which is not allowable. Others treat of it under the head of "Parties," but under the "Formation of Contract," and not only include a discussion of the formation of contracts by agents, but of the whole subject, going into the rights and liabilities of the parties, or the operation of the contract. This does not seem proper, and we have therefore reserved a discussion of the subject for a separate chapter.

*Joint and Several Liability.*

The liability of the parties to a contract, in respect of whether it is joint or several, where there are two or more parties on either side, is also treated by some writers in this connection; but this is a question of the operation of a contract after it has been formed, and we shall so treat it.

This subdivision is limited as far as possible to the question of the capacity of parties to enter into a binding contract.

IN GENERAL.

94. All persons are in law presumed to have capacity to contract, and it is for the person claiming exemption from performing his contract on the ground of incapacity to prove the existence thereof.

<sup>1</sup> Ante, pp. 4, 9.

**95. Incapacity to contract may arise from the following causes:**

- (a) **Political status.** In this connection we will consider contracts by
  - (1) **The United States or state governments;**
  - (2) **Foreign sovereigns or states, and their representatives;**
  - (3) **Aliens;**
  - (4) **Convicts.**
- (b) **Professional status, as in the case of professional contracts by**
  - (1) **Attorneys;**
  - (2) **Physicians; and**
  - (3) **In some jurisdictions, other professional persons.**
- (c) **Youth, as in the case of infants.**
- (d) **Permanent or temporary mental aberration, as in the case of**
  - (1) **Idiocy;**
  - (2) **Insanity;**
  - (3) **Drunkenness.**
- (e) **Merger of capacity, as in case of married women.**
- (f) **Artificiality of construction, as in the case of corporations.**

#### **POLITICAL STATUS—STATES AND UNITED STATES.**

**96. The United States and the states may enter into contracts through their authorized agents, but only in furtherance of the objects of government, and subject to the limitations of the constitution.**

**97. They may sue on their contracts, but cannot be sued unless they submit thereto. This, however, they have very generally done by statutory or constitutional provisions.**

**98. Where they do submit to the jurisdiction of the courts, they are governed by the same principles of law as individuals, except that—**

**EXCEPTION—**Grants from the government are construed most strictly against the grantee, except, perhaps, where the grant is not gratuitous, but for a valuable and adequate consideration.

The power of the United States government and the government of a state to enter into contracts in furtherance of objects for which the government was established, and not prohibited by constitutional limitations, is an incident to the general right of sovereignty. The question arose in the supreme court of the United States in a case in which it was held that a voluntary bond, taken by authority of the proper officers of the treasury department intrusted with the disbursement of public moneys to secure the fidelity in official duties of a receiver or disbursing agent, was a binding contract between him and his sureties and the United States, though the bond was not prescribed by any positive law. "Upon full consideration of this subject," said the court, "we are of opinion that the United States have such capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and, the United States being a body politic, may, within the sphere of the political powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the proper exercise of those powers. \* \* \* To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine to such an extent is not known to this court as ever having been sanctioned by any judicial tribunal."<sup>2</sup> The same doctrine applies to contracts by the state government.<sup>3</sup>

<sup>2</sup> U. S. v. Tingey, 5 Pet. 115. And see U. S. v. Lane, 3 McLean, 365, Fed. Cas. No. 15,539.

<sup>3</sup> Danolds v. State, 89 N. Y. 37.



A contract, however, to bind the government, must be made by its authorized agent, and parties dealing with its agent must see at their peril that the agent has authority.<sup>4</sup>

Where the government enters into a contract, whether a negotiable instrument or otherwise, which it has authority to make, it is bound in any court to whose jurisdiction it submits by the same principles that govern individuals in their relation to such contracts.<sup>5</sup> There is an exception to this rule in the case of grants from the government. Grants between individuals are construed most strongly against the grantor, but a grant from the government, state or federal, is construed most strongly against the grantee. Where the question is "between an individual on one side and the state on the other, and involves the construction of a grant, every intendment is to be made in favor of the state; \* \* \* every reasonable construction is to be made in favor of the public against private rights."<sup>6</sup> It is said, however, that this "rule of construction has been applied to gratuitous grants made by the sovereign of property, franchises, and privileges, upon the solicitation of the grantee," but that it does not apply, "certainly not in its full extent, to grants made for the benefit of the sovereign upon adequate valuable consideration paid to the sovereign for the thing granted."<sup>7</sup>

At common law a sovereign cannot be sued without his consent, and this doctrine prevents suits against a state or against the United States, in the absence of permission by virtue of some statutory or constitutional provision.<sup>8</sup> There are, however, in most

<sup>4</sup> *The Floyd Acceptances*, 7 Wall. 688.

<sup>5</sup> *The Floyd Acceptances*, *supra*; *Danolds v. State*, *supra*; *Patton v. Gilmer*, 42 Ala. 548; *U. S. v. Ingate*, 48 Fed. Rep. 251.

<sup>6</sup> *Canal Com'rs v. People*, 5 Wend. (N. Y.) 423, at page 459. And see 2 Bl. Comm. 347; *Raleigh & G. R. Co. v. Reid*, 64 N. C. 155; *Mayor, etc., of Allegheny v. Ohio & P. R. Co.*, 28 Pa. St. 355; *Hartford Bridge Co. v. Ferry Co.*, 29 Conn. 210; *Northwestern F. Co. v. Hyde Park*, 70 Ill. 634; *Mayor, etc., of New York v. Broadway & S. A. R. Co.*, 97 N. Y. 275, 281.

<sup>7</sup> *Langdon v. Mayor, etc., of New York*, 93 N. Y. 132. And see *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344, 485; *Garrison v. U. S.*, 7 Wall. 688.

<sup>8</sup> *U. S. v. Clarke*, 8 Pet. 436; *Troy & G. R. Co. v. Com.*, 127 Mass. 43; *Ottawa Co. v. Aplin* (Mich.) 36 N. W. Rep. 702; *Michigan State Bank v. Hammond*, 1 Doug. (Mich.) 527; *Michigan State Bank v. Hastings*, Id. 225; *Pat-*

of the states, provisions allowing suit in some form by individuals against the state;<sup>9</sup> and the United States may be proceeded against in the court of claims,<sup>10</sup> and in some cases in the other federal courts.<sup>11</sup> A state or the United States has the same right as an individual to maintain an action on a contract made with it,<sup>12</sup> and it is the proper party to maintain such an action. The officer who entered into the contract cannot sue thereon in his own name.<sup>13</sup>

### SAME—FOREIGN STATES AND SOVEREIGNS.

**99. Foreign sovereigns and states and their representatives may make contracts and sue thereon in our courts, but they cannot be sued unless they submit.**

Foreign states and sovereigns and their representatives, and the officials and household of their representatives, are not subject to the jurisdiction of our courts unless they submit to it.<sup>14</sup> A contract, therefore, entered into with such persons, cannot be enforced against them unless they so choose, but it may be enforced by them.<sup>15</sup>

*tison v. Shaw*, 6 Ind. 377; *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. Rep. 141; *People v. Talmage*, 6 Cal. 257; *Taylor v. Hall*, 71 Tex. 206, 9 S. W. Rep. 148; *Galbes v. Girard*, 46 Fed. Rep. 500; *Ferris v. Land Co.*, 94 Ala. 557, 10 South. Rep. 607. An action against a state or United States officer, which is in effect against the state or the United States, is within the rule. *Ottawa Co. v. Aplin* (Mich.) 36 N. W. Rep. 702; *Taylor v. Hall*, 71 Tex. 206, 9 S. W. Rep. 148; *Aplin v. Board*, 73 Mich. 182, 41 N. W. Rep. 223; *Mills Pub. Co. v. Larabee*, 78 Iowa, 97, 42 N. W. Rep. 593; *State v. Temple*, 134 U. S. 22, 10 Sup. Ct. Rep. 509; *Brown University v. Rhode Island College*, 56 Fed. Rep. 55.

<sup>9</sup> *Wesson v. Com.*, 144 Mass. 60, 10 N. E. Rep. 762; *Green v. State*, 73 Cal. 29, 11 Pac. Rep. 602, and 14 Pac. Rep. 610; *Hoagland v. State* (Cal.) 22 Pac. Rep. 142; *Granville Co. v. State Board*, 106 N. C. 81, 10 S. E. Rep. 1002.

<sup>10</sup> *Nichol v. U. S.*, 7 Wall. 122; *Finn v. U. S.*, 123 U. S. 227, 8 Sup. Ct. Rep. 82; *United States v. Cumming*, 130 U. S. 152, 9 Sup. Ct. Rep. 583.

<sup>11</sup> *Torrey v. U. S.*, 42 Fed. Rep. 207; *Bowe v. U. S.*, Id. 761.

<sup>12</sup> *State v. Grant*, 10 Minn. 39 (Gil. 22); *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. Rep. 439; *People v. City of St. Louis*, 5 Gilman (Ill.) 351; *Spencer v. Brockway*, 1 Ohio, 259.

<sup>13</sup> *Irish v. Webster*, 5 Greenl. (Me.) 171; *Gray v. Paxton*, Quincy (Mass.) 541.

<sup>14</sup> *Taylor v. Best*, 14 Q. B. 487.

<sup>15</sup> See *King of Prussia v. Knepper*, 22 Mo. 550; *Bish. Cont.* § 998.

**SAME—ALIENS.**

100. An alien, not an alien enemy, has in most jurisdictions the same power to contract that a subject has, and may in like manner sue and be sued on his contracts. In some jurisdictions he cannot acquire or hold land.

101. **ALIEN ENEMIES**—An alien enemy cannot, without leave of the government, express or implied, make any contract, or enforce any existing contract, during the continuance of hostilities. Some courts require adherence to the enemy by a resident alien to disqualify him.

102. He may be sued on existing contracts, and in such a case he may defend.

103. Pre-existing contracts are not dissolved by the war unless they are of a continuing nature.

An alien is said to be a person born out of the jurisdiction of the United States, subject to some foreign government, and who has not been naturalized under their constitution and laws,<sup>16</sup> but under our statutes this is not strictly true. It is not within the scope of this work to go fully into this question. The statutes and decisions must be consulted.<sup>17</sup> The right of aliens to take, hold, and dispose of property, real or personal, is generally regulated by

<sup>16</sup> 2 Kent, Comm. 50; *Dawson v. Godfrey*, 4 Cranch, 321; *Ainslie v. Martin*, 9 Mass. 456; 1 Am. & Eng. Enc. Law, 457, note 1.

<sup>17</sup> As to who are aliens, see *State v. Boyd*, 31 Neb. 682, 48 N. W. Rep. 739, and 51 N. W. Rep. 602; *Boyd v. State*, 143 U. S. 135, 12 Sup. Ct. Rep. 375; *State v. Andriano*, 92 Mo. 70, 4 S. W. Rep. 263; *Charles Green's Son v. Salas*, 31 Fed. Rep. 106; *Ware v. Wisner*, 50 Fed. Rep. 310; *City of Minneapolis v. Reum*, 6 C. C. A. 31, 56 Fed. Rep. 576; *Comitis v. Parkerson*, 56 Fed. Rep. 556; minor children of naturalized foreigners, *State v. Andriano*, 92 Mo. 70, 4 S. W. Rep. 263; *Behrensmeier v. Kreitz*, 135 Ill. 591, 26 N. E. Rep. 704; *State v. Boyd*, 31 Neb. 682, 48 N. W. Rep. 739, and 51 N. W. Rep. 602. Alien woman marrying a citizen becomes a citizen. *Ware v. Wisner*, 50 Fed. Rep. 310. Minor children of foreign parents, whose mother, after the death of the father, marries a citizen, become citizens. *Kreitz v. Behrensmeier*, 125 Ill. 141, 17 N. E. Rep. 232. Children born abroad of American citizens are citizens. *Ware v. Wisner*, 50 Fed. Rep. 310.

the states. In some states the constitution expressly prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, and transmission of property.<sup>18</sup> In some of the other states, where there is no such constitutional provision, aliens are prohibited from acquiring and holding real property, while in others nonresidents are not given such right, while residents are; but in many states aliens, whether resident or not, have the same rights in this respect as native-born subjects.<sup>19</sup> In most, if not in all, the states they have the power to make and enforce contracts in respect to personal property, and such contracts may be enforced against them.<sup>20</sup> The rule does not apply to alien enemies.

#### *Alien Enemies.\**

An alien enemy is one who is the subject or citizen of some hostile state or power. An alien, though he may reside in the United States, by reason of his owing allegiance to a hostile state, becomes in time of war impressed with the character of an enemy, though he may personally take no part against us; and it is generally held that he cannot make any fresh contract<sup>21</sup> nor enforce any existing contract<sup>22</sup> during the continuance of hostilities. This rule was applied to contracts between the respective citizens of

<sup>18</sup> The constitution of the particular state should be consulted. See *State v. Smith*, 70 Cal. 153, 12 Pac. Rep. 121; *Necrosi v. Phillippi*, 91 Ala. 299, 8 South. Rep. 561.

<sup>19</sup> See *Milliken v. Barrow*, 55 Fed. Rep. 148; *Manuel v. Wulff*, 14 Sup. Ct. Rep. 651; *McCreery v. Allender*, 4 Har. & McH. (Md.) 409; *Zundel v. Gess* (Tex. Sup.) 9 S. W. Rep. 879; *Wonderle v. Wonderle* (Ill. Sup.) 32 N. E. Rep. 135; *Furenes v. Mickleson* (Iowa) 53 N. W. Rep. 416; *Bennett v. Hibbert* (Iowa) 53 N. W. Rep. 93.

<sup>20</sup> *Taylor v. Carpenter*, 3 Story (U. S. C. C.) 458, Fed. Cas. No. 13,784; *Franco-Texan Land Co. v. Chaptive* (Tex. Sup.) 3 S. W. Rep. 31.

\* Post. p. 426.

<sup>21</sup> *Scholefield v. Eichelberger*, 7 Pet. 586; *O'Mealey v. Wilson*, 1 Camp. 482; *Phillips v. Hatch*, 1 Dill. 571, Fed. Cas. No. 11,094; *Hill v. Baker*, 32 Iowa, 302; *The Rapid*, 8 Cranch, 155; *Masterson v. Howard*, 18 Wall. 99; *Mutual, etc., Ins. Co. v. Hilyard*, 37 N. J. Law, 444; *Wright v. Graham*, 4 W. Va. 430; *Habricht v. Alexander*, 1 Woods (U. S. C. C.) 413, Fed. Cas. No. 5,886; *De Jarnett v. De Giverville*, 56 Mo. 440.

<sup>22</sup> *Brooke v. Flier*, 35 Ind. 402; *Blackwell v. Willard*, 65 N. C. 555; *Semmes v. City Fire Ins. Co.*, 36 Conn. 543.

the Northern and Southern states during the Civil War.<sup>23</sup> Though an alien enemy cannot sue on contracts during the continuance of hostilities, he may be sued, and in such case he may defend.<sup>24</sup> In a New York case it was held that to defeat a suit by a resident subject of a foreign hostile power it must appear that he is adhering to the enemy; that aliens resident in the United States at the time of war breaking out between their own country and the United States, or who come to reside in the United States after the breaking out of war, under an express permission, or permission implied from their being allowed to remain, may sue and be sued as in time of peace, since a license and protection will be implied from their being suffered to remain.<sup>25</sup>

*Same—Pre-Existing Contracts.*

Whether a pre-existing contract is dissolved or not by the war depends upon whether it is essentially antagonistic to the laws governing a state of war. If it is of a continuing nature, as in the case of a partnership, or of an executory character merely, and in the performance of its essential features would violate such laws, it would be dissolved; but, if not, and rights have become vested under it, the contract will either be qualified, or its performance suspended, according to its nature, so as to strip it of its objectionable features, and save such rights. The tendency of adjudication is to preserve, and not to destroy, contracts existing before the war.<sup>26</sup>

<sup>23</sup> See cases in preceding notes.

<sup>24</sup> *Dorsey v. Thompson*, 37 Md. 25; *McVeigh v. U. S.*, 11 Wall. 259; *Mixer v. Sibley*, 53 Ill. 61; *McNair v. Toler*, 21 Minn. 175.

<sup>25</sup> *Clarke v. Morey*, 10 Johns. (N. Y.) 69.

<sup>26</sup> *Mutual, etc., Ins. Co. v. Hillyard*, 37 N. J. Law, 441; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *Semmes v. City Fire Ins. Co.*, 36 Conn. 543; *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Cohen v. New York Mut. Life Ins. Co.*, 50 N. Y. 610; *Washington University v. Finch*, 18 Wall. 106; *Whelan v. Cook*, 29 Md. 1; *Dorsey v. Kyle*, 30 Md. 512; *Dorsey v. Thompson*, 37 Md. 25.

**SAME—CONVICTS.**

104. In this country a convict can in most jurisdictions, unless prohibited by statute, make contracts, and sue and be sued thereon.

105. In some jurisdictions there are statutes suspending a convict's power to contract while under sentence of imprisonment for a less term than life, and declaring that in case of imprisonment for life he shall be deemed civilly dead.

At common law a person who has been convicted of treason or felony could not, during the continuance of his conviction, make a valid contract; nor could he enforce contracts made previous to conviction, though they might be enforced by an administrator appointed for that purpose. With us this rule is not recognized to any extent, and a convict undergoing a sentence of imprisonment, or even awaiting execution of a sentence of death, may, in the absence of statutory restrictions, enter into contracts, and sue or be sued thereon.<sup>27</sup> In some states, however, there are statutes declaring that a sentence of imprisonment in the penitentiary shall suspend all civil rights, and in these states a contract by a convict while under sentence is void.<sup>28</sup> This, however, does not render him civilly dead, unless the statute so provides, as it does generally where the sentence is for life; nor prevent his creditor from suing him, for, though his civil rights are suspended, the rights of creditors are not suspended.<sup>29</sup>

**PROFESSIONAL STATUS.**

106. Attorneys, physicians, and some other professional men are generally required by statute to comply with pre-

<sup>27</sup> *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118; *Willingham v. King*, 23 Fla. 478, 2 South. Rep. 851; *In re Estate of Nerac*, 35 Cal. 392. And see *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. Rep. 435.

<sup>28</sup> *Williams v. Shackelford*, 97 Mo. 322, 11 S. W. Rep. 222.

<sup>29</sup> *In re Estate of Nerac*, 35 Cal. 392.

scribed regulations as to qualification, license, etc., and unless they have done so they cannot make a valid contract for the performance of professional services.

Formerly, in England, a barrister could not sue for fees due him for services rendered in the ordinary course of his professional duties, and a physician was so far in the same position as a barrister that, until the law was changed by statute, the rendition of services on request raised no implied promise to pay for them, though the patient might bind himself by express contract. But these disabilities are not to any extent recognized in this country.<sup>30</sup> There are, however, in most, if not all, the states, statutes prescribing certain requisites to entitle a physician, attorney, dentist, and certain other professional men to practice, such as the procurement of a certificate from the proper authorities that he is qualified, and the taking out of a license. Until he has complied with the statute, he has no right to practice, and contracts made with him for professional services are void.<sup>31</sup>

Owing to the confidential relation between an attorney and his client, or a physician and his patient, contracts between them are closely scrutinized. The law raises a presumption against their validity, and the attorney or physician must show that there was perfect good faith, that there was no undue influence, and that his client acted with full knowledge of the circumstances.<sup>32</sup> This, however, is not properly for treatment here.

<sup>30</sup> *Vilas v. Downer*, 21 Vt. 419; *Garrey v. Stadler*, 67 Wis. 248, 30 N. W. Rep. 787; *Price v. Hay*, 132 Ill. 543, 24 N. E. Rep. 620; *Boyd v. Lee*, 36 S. C. 19, 15 S. E. Rep. 332. In New Jersey, counsel fees, as such, cannot be recovered in the absence of an express agreement. *Van Atta v. McKinney*, 16 N. J. Law, 235; *Blake v. City of Elizabeth*, 2 N. J. Law J. 328; *Hopper v. Ludlum*, 41 N. J. Law, 182. It is otherwise where there is an express agreement to pay for them. *Zabriskie v. Woodruff*, 48 N. J. Law, 610, 7 Atl. Rep. 336.

<sup>31</sup> *Orr v. Meek*, 111 Ind. 40, 11 N. E. Rep. 787; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. Rep. 767; *Davidson v. Bohlman*, 37 Mo. App. 576; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. Rep. 880; *Underwood v. Scott*, 43 Kan. 714, 23 Pac. Rep. 942; *Fox v. Dixon*, 12 N. Y. Supp. 267; *Haworth v. Montgomery*, 91 Tenn. 16, 18 S. W. Rep. 399; *Hargan v. Purdy* (Ky.) 20 S. W. Rep. 432; *Roberts v. Levy* (Cal.) 31 Pac. Rep. 570. See post, p. 301.

<sup>32</sup> *Thomas v. Turner's Adm'r*, 87 Va. 1, 12 S. E. Rep. 149; *Dunn v. Dunn* (N. J.) 7 Atl. Rep. 842. See, also, post, p. 308.

**INFANTS—IN GENERAL.**

107. At common law an infant is a person under twenty-one years of age, but by statute in some states females attain their majority at eighteen.

108. Emancipation of an infant by his parent does not affect his capacity to contract.

109. Some contracts of an infant are valid, and a few are absolutely void, but most of his contracts are simply voidable at his option.

110. **VALID CONTRACTS**—The valid contracts of an infant are:

- (a) Contracts created by law.
- (b) Contracts for necessities.
- (c) Contracts entered into under authority or direction of a statute.
- (d) Contracts made in order to do what he was legally bound to do, and could have been compelled to do.
- (e) In some jurisdictions an executed contract is binding on an infant where he has received a substantial benefit under it, and cannot place the other party in statu quo; but as to this there is much doubt, and the weight of authority is to the contrary.

111. **VOID CONTRACTS**—It is said that any contract of an infant which is manifestly and without doubt to his prejudice is void, but as to this there is doubt.

112. **VOIDABLE CONTRACT**—The tendency is to hold all contracts other than valid ones simply voidable at the infant's option.

An infant, at common law, is a person under twenty-one years of age, whether male or female; but in some jurisdictions, by statute, females attain their majority at eighteen, either for all purposes or for particular purposes specified in the statute. Since the com-



mon law, as a rule, does not regard fractions of a day, an infant becomes of age on the beginning of the day before his or her twenty-first or eighteenth birthday, as the case may be.<sup>33</sup>

At common law, an infant is conclusively presumed not to have sufficient discretion and judgment to be able to enter into contracts, though, as we shall see, the law will sometimes create contracts for him, and will uphold contracts which are manifestly to his advantage; and under some circumstances will not allow him to repudiate contracts which he has executed, and which have been beneficial to him. The universal rule, however, is that an infant's executory contract cannot be enforced against him, and he can generally avoid his executed contracts. The age at which he ceases to be under disability and becomes capable of making a binding promise is arbitrarily fixed by law. A person of twenty years may in fact be much more capable of contracting than a person of mature years, but the law does not look at his actual capacity. If he is a week under the age of twenty-one, and even though he is in fact of sound judgment and business experience, his incapacity in law is just as great as that of a young child. An arbitrary age had to be fixed upon, and it was fixed at twenty-one.<sup>34</sup> As we shall see, the contracts of an infant, as a rule, are not void, but simply voidable at his option. The rule is intended for the infant's benefit; and it may therefore be said that infancy in effect confers a privilege, rather than imposes a disability; and when we speak of the disability of an infant we so understand the term.

Emancipation of an infant by his parent gives him the right to his earnings, and releases him from his parent's control, but it does not remove his disability, and clothe him with the power to contract.<sup>35</sup>

<sup>33</sup> Metc. Cont. (Heard's Ed.) 43; *Herbert v. Turball*, 1 Keble, 589, Ewell's Cas. 1; *Bardwell v. Purrington*, 107 Mass. 419; *State v. Clarke*, 3 Harr. (Del.) 557; *Hamlin v. Stevenson*, 6 Ind. 447; *Lenhart v. State* (Tex. Crim.) 27 S. W. Rep. 280.

<sup>34</sup> Metc. Cont. (Heard's Ed.) 42; Co. Litt. 171b.

<sup>35</sup> *Mason v. Wright*, 13 Metc. (Mass.) 306; *Tyler v. Fleming*, 68 Mich. 186, 35 N. W. Rep. 902; *Genereux v. Sibley* (R. I.) 25 Atl. Rep. 345. It may be that a grantor of land to an infant may authorize the infant to sell and convey the same so as to render a deed by the infant binding, but the fact that in an absolute conveyance of land to an infant it is provided that he shall have the

It should be mentioned that in some jurisdictions the court is authorized by statute to remove the disabilities of infants in particular cases.<sup>26</sup>

*The Old Doctrine as to the Effect of an Infant's Contract.*

There is much confusion and conflict in the authorities as to the effect of the contracts of infants. Most of them are voidable at the infant's option, but binding on the other party if the infant chooses to hold him. Some of them are valid and binding on the infant, without regard to his wishes. Others have been held absolutely void. In an English case the doctrine was stated to be that (1) where the court could pronounce the contract for the benefit of the infant, as for necessities, it was good; (2) that where the court could pronounce it to be to his prejudice it was void; and (3) that in those cases where the benefit or prejudice were uncertain the contract was voidable only; and the same doctrine has been laid down by some of the American courts and text writers.<sup>27</sup>

The statement, however, is misleading, if not erroneous. In the first place, many contracts are binding on an infant without regard to whether they are for his benefit or not. In the second place, the great weight of authority is against making any distinction between contracts of an infant as being void or voidable, and in favor of holding all contracts other than valid ones, with a very few exceptions, simply voidable by the infant at his option.<sup>28</sup> The

right to sell and convey it does not remove his disability in that respect. *Sewell v. Sewell*, 92 Ky. 500, 18 S. W. Rep. 162.

<sup>26</sup> See *Doles v. Hilton*, 48 Ark. 305, 3 S. W. Rep. 193; *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. Rep. 111; *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. Rep. 312; *Emancipation of Pochelleu*, 41 La. Ann. 331, 6 South. Rep. 541; *Succession of Gainez*, 42 La. Ann. 699, 7 South. Rep. 788.

<sup>27</sup> *Keane v. Boycott*, 2 H. Bl. 511; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Tucker v. Moreland*, 10 Pet. 65; *Owen v. Long*, 112 Mass. 403; *Dunton v. Brown*, 31 Mich. 182; *Green v. Wilding*, 59 Iowa, 679, 13 N. W. Rep. 761; *Robertson v. Weeks*, 56 Me. 102.

<sup>28</sup> *Henry v. Root*, 33 N. Y. 526; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. Rep. 772; *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. Rep. 476; *Reed v. Batchelder*, 1 Metc. (Mass.) 559; *Harner v. Dipple*, 31 Ohio St. 72; *Lawrence v. McArter*, 10 Ohio, 38; *Kendrick v. Niesz*, 17 Colo. 506, 30 Pac. Rep. 245; *Owen v. Long*, 112 Mass. 403; *Felvin v. Wiseman*, 40 Ind. 148; *Scran-*

object of the law is merely to protect the infant, and this object is amply secured by not allowing the contract to be enforced against him during his infancy, and allowing him to repudiate it on attaining his majority. Moreover, such a distinction must necessarily be arbitrary and doubtful, for it must always be difficult, if not impossible, to say whether a particular contract may not possibly be beneficial. It is better to allow the infant to decide this question for himself when he becomes of age."<sup>39</sup>

*Valid Contracts.*

The contracts which are binding on an infant may be divided into (a) contracts created by law; (b) contracts made in fact under authority or direction of a statute; (c) contracts made in fact in order to do what he was legally bound to do, and could have been compelled to do; (d) certain executed contracts, where the parties cannot be placed in statu quo, though as to this there is much conflict and doubt; and (e) contracts for necessities furnished to the infant himself, or to his wife and children.

*Same—Contracts Created by Law.*

Quasi contracts, or contracts created by law because of a legal duty on the part of the person bound, are as binding on an infant as on an adult.<sup>40</sup> The common law creates, as an incident to marriage, a duty on the part of the husband to pay the antenuptial debts of the wife, and implies a promise or contract on his part to pay them. This liability is imposed on infant as well as adult husbands.<sup>41</sup> Contracts for necessities are said to be included under contracts created by law, but, as there is some doubt on the subject, it is better to postpone their consideration.

ton v. Stewart, 52 Ind. 68; Mustard v. Wohlford, 15 Grat. (Va.) 329; Hunt v. Peake, 5 Cow. (N. Y.) 475; Illinois Land, etc., Co. v. Bonner, 75 Ill. 315; Cole v. Pennoyer, 14 Ill. 158; Patchin v. Cromach, 13 Vt. 330; Tucker v. Moreland, 10 Pet. 58; Bozeman v. Browning, 31 Ark. 364; Weaver v. Jones, 24 Ala. 420; Ridgely v. Orandall, 4 Md. 435; Nightingale v. Withington, 15 Mass. 272.

<sup>39</sup> Pol. Cont. 52; 1 Pars. Cont. 244.

<sup>40</sup> Bish. Cont. § 906.

<sup>41</sup> Roach v. Quick, 9 Wend. (N. Y.) 238; Cole v. Seeley, 25 Vt. 220; Butler v. Breck, 7 Metc. (Mass.) 164; Mitchinson v. Hewson, 7 Term R. 348; Nicholson v. Willborn, 13 Ga. 467; Anderson v. Smith, 33 Md. 463.

*Same—Made in Fact.*

The rule that contracts of infants are voidable does not apply to contracts entered into by them under authority or direction of a statute. For instance, a voluntary assignment of his property by an infant debtor imprisoned for debt, made under a statute allowing "every person" to make such an assignment, has been held valid and binding on him, notwithstanding his infancy. As the statute was in general terms, it was held applicable to infants as well as adults.<sup>42</sup> So, also, where an infant executed a bond for the support of his bastard child, in pursuance of a statute, it was held that the statute applied to infants, and that the bond was valid;<sup>43</sup> and a contract of enlistment in the army by an infant has been held valid.<sup>44</sup>

Nor does the rule apply where, by his contract, an infant has only done that which he was bound by law to do, and could have been compelled to do. In such a case the contract is valid, and he cannot avoid it.<sup>45</sup> Under this rule, a conveyance of land by an infant,

<sup>42</sup> *People v. Mullin*, 25 Wend. (N. Y.) 698.

<sup>43</sup> *People v. Moores*, 4 Denio (N. Y.) 518. And see *McCall v. Parker*, 13 Metc. (Mass.) 372; *Inhabitants v. Wallace*, 50 N. J. Law, 13, 11 Atl. Rep. 267; *Gavin v. Burton*, 8 Ind. 69; *Stowers v. Hollis*, 83 Ky. 544. An infant's recognition for appearance at court is binding. *State v. Weatherwax*, 12 Kan. 463; *Dial v. Wood*, 9 Baxt. (Tenn.) 296.

<sup>44</sup> *U. S. Bainbridge*, 1 Mason, 71, Fed. Cas. No. 14,497; *Com. v. Murray*, 4 Bin. (Pa.) 487; *U. S. v. Blakeney*, 3 Grat. (Va.) 405; *In re Higgins*, 16 Wis. 351; *In re Hearn*, 32 Fed. Rep. 141. Subject, however, to avoidance by parent if he has not consented. *In re Hearn*, *supra*.

<sup>45</sup> *Co. Litt.* 172a; 2 Kent, Comm. 242; *Zouch v. Parsons*, 3 Burrows, 1794; *Tucker v. Moreland*, 10 Pet. 58; *Elliott v. Horn*, 10 Ala. 348; *Prouty v. Edgar*, 6 Iowa, 353; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Baker v. Lovett*, 6 Mass. 78; *Trader v. Jarvis*, 23 W. Va. 100; *Sheldon v. Newton*, 3 Ohio St. 494; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. Rep. 599; *Starr v. Wright*, 20 Ohio St. 97. A voluntary equal partition by an infant, since he could be compelled to make it, is valid. *Bavington v. Clarke*, 2 Pen. & W. (Pa.) 115; *Cocks v. Simmons*, 57 Miss. 183. It is otherwise if the partition is unequal. *Rainsford v. Rainsford*, 1 Speer, Eq. (S. C.) 385. So, also, a contract by a minor with the mother of his bastard child to support it is binding. *Stowers v. Hollis*, 83 Ky. 544; *Gavin v. Burton*, 8 Ind. 69. And see note 43, *supra*. The execution by an infant of a naked power is binding on him, *Sheldon v. Newton*, 3 Ohio St. 494; but not the execution of a power coupled with an interest, *Thompson v. Lyon*, 20 Mo. 155.

which he could have been compelled in equity to make, is binding on him. Where, for instance, a father purchased land, and took the title in the name of his son, and the son afterwards during his minority conveyed it to a purchaser from his father, the conveyance was held to be binding, on the ground that he merely parted with the naked title, and only did that which a court of equity would have compelled him to do. "We do not understand the law to be," said the court, "that every act of an infant, though it be by deed, is voidable at his election on his attaining his majority. It is an ancient maxim of the common law that 'generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law.'" <sup>46</sup> In the leading case on this point an infant mortgagee had, on payment of the mortgage debt to the persons entitled to receive it, made a reconveyance of the land, and the court held that, as this was an act which by law he could have been compelled to perform, his voluntary performance of it was binding, notwithstanding his infancy.<sup>47</sup>

It is said in a New York case: "When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation. If this be not a general rule, it is at least one of pretty wide application, as a few examples will prove. An infant is bound to pay a judgment or a debt contracted for necessities, and he may make a valid promise to refund the money to any one who will satisfy the judgment or debt."<sup>48</sup> An infant is under a legal obligation to provide for the support of his wife and children, and he is answerable on his contract for necessities furnished them."<sup>49</sup>

In Vermont an infant was held liable on a note given in settlement of his liability for a tort. "The law makes him liable for his torts," said the court, "and where he elects to settle such liability by giving his note, as long as the consideration for the note is open to inquiry, we see no reason why he should not be held liable in an action upon the note to the same extent that he would be if the action had been brought upon the cause of action which

<sup>46</sup> *Elliott v. Horn*, 10 Ala. 348.

<sup>47</sup> *Zouch v. Parsons*, 3 Burrows, 1801.

<sup>48</sup> *Clarke v. Leslie*, 5 Esp. 28; *Randall v. Sweet*, 1 Denio (N. Y.) 460.

<sup>49</sup> *People v. Moores*, 4 Denio (N. Y.) 518.

formed the consideration for the note. The note in suit having been given in settlement of a claim for which the defendant was liable, and no fraud or imposition having been practiced in obtaining it, the plea of infancy is not available to defeat it."<sup>50</sup>

*Same—Executed Contracts.*

Lord Kenyon once said that, "if an infant was to buy a thing, not being necessaries, he could not be compelled to pay for it; but, having done so, he could not recover back the money;"<sup>51</sup> but this dictum is too broad.<sup>52</sup> There are, however, some executed contracts of infants which, though not for necessaries, have been held irrevocable. We will simply notice the subject shortly here, and postpone a fuller discussion until we come to treat of the avoidance of contracts.

Mr. Bishop, in his work on Contracts, states that mere purchases at stores in the way of shopping, where the articles are received and the price paid, are irrevocable; that, if an infant goes upon the streets of a city, shopping, he cannot afterwards retrace his steps, and get back the money he paid, even though he tenders the goods in return, for to permit it would render shopkeeping impossible.<sup>53</sup> There seems to be no authority, however, for such a proposition, and it is, to say the least, doubtful whether it would be so held. To hold such contracts voidable would fall far short of rendering shopkeeping impossible, and would cause less hardship and inconvenience than in many of the cases in which an infant has been allowed to avoid his contracts. Besides, the proposition, if true, would allow an improvident infant to squander his means without any protection.<sup>54</sup>

If an infant has paid or done something towards the performance of his contract, and has himself received nothing in the transaction, the authorities are virtually agreed that he can repudiate the

<sup>50</sup> *Ray v. Tubbs*, 50 Vt. 688.

<sup>51</sup> *Wilson v. Kearse*, Peake, Add. Cas. 196.

<sup>52</sup> *Corpe v. Overton*, 10 Bing. 252; *Medbury v. Watrous*, 7 Hill (N. Y.) 110.

<sup>53</sup> *Bish. Cont.* § 921.

<sup>54</sup> See *Riley v. Mallory*, 33 Conn. 201. It cannot be that, if an infant should go into a store and buy and pay for a diamond, he would be denied the right to return it, and demand the money paid by him. If he could avoid the purchase of a diamond, he could avoid the purchase of a less valuable article; and if he could avoid the purchase of one article he could avoid the purchases of any number of articles from any number of shopkeepers.

contract, and recover the money paid, or for what he has done.<sup>55</sup> When we pass beyond this simple proposition to contracts in which the infant has received a substantial benefit in return for what he has given, the authorities begin to conflict. It has been said that, if an infant has performed his part of the contract, he cannot afterwards repudiate it, and recover what he has paid, or for what he has done, if he has received the consideration from the other party;<sup>56</sup> but it is probably safe to say that this is not the law in any of our states. In this country at least, and probably in England as well, it is settled that an infant can certainly repudiate his executed contract, and recover what he has parted with, if he can return what he has received, and so place the other party in statu quo.<sup>57</sup> Beyond this the courts are in direct conflict. Some courts hold, or seem to hold, that, if the infant has received the benefit of the consideration, he cannot recover what he has paid, or for what he has done, unless he can and does return the consideration which he has received;<sup>58</sup> but this is against the weight of authority. Most courts hold that, though, to avoid a contract which he has executed, he is bound to return the consideration, if he has it when he attains his majority, yet he may avoid the contract, and recover what he has parted with, without such a return, if during his minority he has squandered or otherwise disposed of what he received, and is therefore unable to return it.<sup>59</sup>

*Same—Contracts for Necessaries.*

It has always been held that an infant may bind himself to pay for necessities furnished him. This branch of the subject is such an extensive one that we shall presently treat it more at length. It is only necessary to call attention to it here as included among the valid contracts of infants.

<sup>55</sup> Post, p. 259.

<sup>56</sup> Bish. Cont. § 921.

<sup>57</sup> Bish. Cont. § 921; *House v. Alexander*, 105 Ind. 109, 4 N. E. Rep. 891; *McCarthy v. Henderson*, 138 Mass. 310

<sup>58</sup> 2 Kent, Comm. 240; *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Adams v. Beall*, 67 Md. 53, 8 Atl. Rep. 664; post, p. 257. It has been held, for instance, that where money has been paid by an infant in consideration of being admitted as a partner in a business, and he does become and remain a partner for a time, he cannot recover the money thus paid by him, unless he was induced to enter into the partnership by fraud. *Adams v. Beall*, supra.

<sup>59</sup> Post, p. 256, and cases cited.

*Void Contracts.*

Probably most courts would still hold that a contract manifestly and without doubt prejudicial to the infant is absolutely void, but such contracts must necessarily be of very rare occurrence. Some courts seem to have gone further, and to have held contracts void though there was a possibility that they might prove beneficial.<sup>60</sup> It is impossible to reconcile the decisions on this point. All that can be done is to state shortly some of the more important of them. Most of the courts, even those which do not to any extent recognize the old common-law doctrine as to void and voidable contracts, hold—subject to an exception in the case of a power of attorney to a person to take an estate conveyed to him—that all powers of attorney or appointments of attorney, in whatever form, whether under seal or by parol or in writing, are absolutely void.<sup>61</sup> The exception stated is a case in which the appointment is manifestly for the infant's benefit. Some courts seem to have extended the rule to include all appointments of agents by an infant, so as to prevent an infant from doing anything through an agent.<sup>62</sup> Among the other contracts of an infant which have been held void as manifestly to his prejudice may be mentioned conveyances of land without consideration,<sup>63</sup> contracts of suretyship,<sup>64</sup> and obligations with a penalty.<sup>65</sup>

*Voidable Contracts.*

As before stated, those contracts of an infant which may possibly be beneficial to him are held not void nor valid, but simply void-

<sup>60</sup> See *Oliver v. Houdlet*, 13 Mass. 237. For a collection of cases on the question when a contract by an infant is to be held void and when merely voidable, see *Ewell*, *Lead. Cas.* 30-34, 44-46, 52-55.

<sup>61</sup> *Saunderson v. Marr*, 1 H. Bl. 75; *Ewell*, *Lead. Cas.* 35; *Wainwright v. Wilkinson*, 62 Md. 146; *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Lawrence v. McArter*, 10 Ohio, 37; *Knox v. Flack*, 22 Pa. St. 337; *Waples v. Hastings*, 3 Harr. (Del.) 403; *Pyle v. Cravens*, 4 Litt. (Ky.) 17. A distinction has been made between a naked power of attorney and a power of attorney coupled with an interest, the power in the latter case being voidable, and not void. *Dewall v. Graves*, 7 Bish. (Ky.) 461.

<sup>62</sup> *Trueblood v. Trueblood*, 8 Ind. 195; *Holden v. Curry*, 85 Wis. 504, 55 N. W. Rep. 965; *Flexner v. Dickerson*, 72 Ala. 318; *Armitage v. Widoe*, 36 Mich. 124.

<sup>63</sup> *Robinson v. Coulter*, 90 Tenn. 705, 18 S. W. Rep. 250.

<sup>64</sup> *Maples v. Wightman*, 4 Conn. 376.

<sup>65</sup> *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dinely*, 3 Maule & S. 477.



able at his option. As we have also stated, many courts do not recognize to any extent the doctrine distinguishing between contracts as void and voidable, on the ground that it is difficult, if not impossible, to say that any particular contract may not possibly be of benefit, and that it is therefore better to leave it for the infant to determine the question for himself when he comes of age.<sup>66</sup> Contrary, therefore, to the decisions mentioned in the preceding paragraph, some courts have held powers of attorney and appointments of an agent,<sup>67</sup> contracts of suretyship,<sup>68</sup> and bonds with a penalty,<sup>69</sup> voidable, and not absolutely void. Probably all courts regard as merely voidable purchases or sales and conveyances of real or personal property, including mortgages, for a consideration,<sup>70</sup> partnership agreements,<sup>71</sup> agreements to render services,<sup>72</sup> promissory notes,<sup>73</sup> indorsement of a promissory note,<sup>74</sup> and the like.<sup>75</sup>

<sup>66</sup> Ante, p. 223, and cases cited.

<sup>67</sup> *Hardy v. Waters*, 38 Me. 450; *Hastings v. Dollarhide*, 24 Cal. 195; *Whitney v. Dutch*, 14 Mass. 457; *Ferguson v. Railway Co.*, 73 Tex. 344, 11 S. W. Rep. 347; *Cummings v. Powell*, 8 Tex. 81; *Voglesang v. Null*, 67 Tex. 465, 3 S. W. Rep. 451; *Towle v. Dresser*, 73 Me. 252; *Alsworth v. Cordtz*, 31 Miss. 32.

<sup>68</sup> *Owen v. Long*, 112 Mass. 403; *Reed v. Lane*, 61 Vt. 481, 17 Atl. Rep. 796; *Fetrow v. Wiseman*, 40 Ind. 148; *Williams v. Harrison*, 11 S. C. 412; *Harner v. Dipple*, 31 Ohio St. 72.

<sup>69</sup> *Mustard v. Wohlford*, 15 Grat. (Va.) 320; *Weaver v. Jones*, 24 Ala. 420.

<sup>70</sup> *Cole v. Pennoyer*, 14 Ill. 158; *Irvine v. Irvine*, 9 Wall. 617; *Zouch v. Parsons*, 3 Burrows, 1794; *Bigelow v. Kinney*, 3 Vt. 353; *Dixon v. Merritt*, 21 Minn. 196; *Hastings v. Dollarhide*, 24 Cal. 195; *Logan v. Gardner*, 136 Pa. St. 588, 20 Atl. Rep. 625; *French v. McAndrew*, 61 Miss. 187; *Henry v. Root*, 33 N. Y. 526; *Callis v. Day*, 38 Wis. 643; *Manning v. Johnson*, 26 Ala. 446.

<sup>71</sup> *Dunton v. Brown*, 31 Mich. 182.

<sup>72</sup> *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Clark v. Goddard*, 39 Ala. 164; *Harney v. Owen*, 4 Blackf. (Ind.) 337. And see post, p. 259.

<sup>73</sup> *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Fetrow v. Wiseman*, 40 Ind. 148; *Wamsley v. Lindenberger*, 2 Rand. (Va.) 478; *Earle v. Reed*, 10 Metc. (Mass.) 389; *Minoock v. Shortridge*, 21 Mich. 314.

<sup>74</sup> *Nightingale v. Withington*, 15 Mass. 272; *Willis v. Twambley*, 13 Mass. 204; *Frazier v. Massey*, 14 Ind. 382; *Briggs v. McCabe*, 27 Ind. 327.

<sup>75</sup> Lease by or to infant. *Zouch v. Parsons*, 3 Burrows, 1794; *Griffith v. Schwenderman*, 27 Mo. 412. Submission to arbitration. *Jones v. Bank*, 8 N. Y. 228; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221. Settlement of disputed boundary. *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114. Compro-

**SAME—CONTRACTS FOR NECESSARIES.**

**113. An infant is liable for the reasonable value of necessities furnished him.**

**114. What are necessities will depend upon the particular circumstances. The term includes whatever is reasonably needed for his subsistence, health, comfort, or education, taking into consideration his state, station, and degree in life. The following rules may be stated:**

- (a) The articles must be for use, and not for ornament, nor for pleasure merely.**
- (b) The quality and quantity furnished must be reasonable.**
- (c) Things with which an infant is already supplied are not necessities.**
- (d) He is not liable even for things needed if he lives at home, and is supported by his father; and it seems that the poverty of the father makes no difference.**
- (e) The things furnished must concern his person, and not his estate.**
- (f) He is not liable for money borrowed, and expended for necessities, unless the lender sees that it is so expended.**

mise of action or claim. *Ware v. Cartledge*, 24 Ala. 622; *Baker v. Lovett*, 6 Mass. 78. An infant's promise to marry is voidable at his or her option. *Holt v. Ward Clarendieux*, 2 Strange, 937, Ewell, Lead. Cas. 50; *Hunt v. Peake*, 5 Cow. (N. Y.) 475; *Rush v. Wick*, 31 Ohio St. 521; *Cannon v. Alsbury*, 1 A. K. Marsh (Ky.) 76; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659. And it has been held that a statute providing that persons under the age of 21 years "may contract and be joined in marriage" does not remove an infant's disability in this respect, so as to render him liable for breach of promise to marry. The statute only means that an actual marriage by such a person shall be valid, and does not give him capacity to bind himself by a contract to marry. *McConkey v. Barnes*, 42 Ill. App. 511.

115. An infant is liable for necessities furnished his wife and children.

116. Persons supplying an infant act at their peril, and cannot recover if the actual circumstances were such that the things furnished were not necessities.

117. Being only liable for the reasonable value of the things furnished, an infant cannot bind himself by an express contract of a nature which precludes inquiry into the consideration; but, if the consideration may be inquired into, the express contract is binding to the extent of the value of the necessities.

Among the contracts which are manifestly for the benefit of an infant are his contracts for necessities. To allow him to repudiate such contracts, and escape liability to pay for what he has received, would often render it impossible for him to obtain what he needs, and so expose him to want and suffering. It is well settled, therefore, that an infant is liable for necessities furnished him.

*What are Necessaries.*

Lord Coke has said that an infant's necessities are "his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise his good teaching or instruction, whereby he may profit himself afterwards."<sup>16</sup> Under this rule necessities will include whatever is reasonably needed for the infant's subsistence, such as food and lodging;<sup>17</sup> for his health, such as medicine, and services of a physician or nurse in case of sickness;<sup>18</sup> for his com-

<sup>16</sup> Co. Litt. 172a. For a good discussion of the law in regard to necessities, see *Ryder v. Wombwell*, L. R. 3 Exch. 95.

<sup>17</sup> *Barnes v. Barnes*, 50 Conn. 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274. Dinners supplied to a student at private rooms at a university, prima facie not necessities. *Brooker v. Scott*, 11 Mees. & W. 67; *Wharton v. McKenzie*, 5 Q. B. 606. Hotel bill. *Watson v. Cross*, 2 Duv. (Ky.) 147. Dwelling house not a necessary. *Allen v. Lardner*, 29 N. Y. Supp. 213.

<sup>18</sup> *Glover & Co. v. Ott*, 1 McCord (S. C.) 572; *Werner's Appeal*, 91 Pa. St. 222. And see *Hoyt v. Casey*, 114 Mass. 397; *Walling v. Toll*, 9 Johns. (N. Y.) 141. A horse may be necessary for health, *Hart v. Prater*, 1 Jur. 623; *Harrison v. Fane*, 1 Man. & G. 550; but not if for pleasure, note 84, *infra*.

fort,<sup>30</sup> and for his education.<sup>31</sup> The term is not limited to what is necessary to the actual support of life, but extends "to articles fit to maintain the particular person in the state, station, and degree in life in which he is," so that things may be necessary for one person which would not be necessary for another in a different station in life.<sup>32</sup>

<sup>30</sup> *Dentist's services.* *Strong v. Foote*, 42 Conn. 203. An infant is liable for reasonable attorney's fees for defending him in a criminal prosecution. *Askey v. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101; *Barker v. Hibbard*, 54 N. H. 539. And see *Mumson v. Washband*, 31 Conn. 303. Livery for servant. *Hand v. Slaney*, 8 Term R. 578. Wedding outfit. *Jordan v. Coffield*, 70 N. C. 110; *Sams v. Stockton*, 14 B. Mon. (Ky.) 187. Clothing. *Mackerell v. Batchelor*, Cro. Eliz. 583; *Glover & Co. v. Ott*, 1 McCord (S. C.) 572. But not for an unnecessary supply of clothing. *Johnson v. Lines*, 6 Watts & S. (Pa.) 50; *Burghart v. Angerstein*, 6 Car. & P. 690.

<sup>31</sup> Common-school education, but not generally a college education, though the latter may, under some circumstances, be a necessary. *Middlebury College v. Obandler*, 16 Vt. 686; *Pickering v. Gunning*, W. Jones, 182. Board bill contracted by an infant to enable him to attend school is a necessary expense. *Kilgore v. Rich*, 83 Me. 305, 22 Atl. Rep. 176. Professional education not necessary. *Turner v. Galther*, 83 N. C. 357; *Bouchell v. Clary*, 3 Brev. (S. C.) 194.

<sup>32</sup> *Peters v. Fleming*, 6 Mees. & W. 46; *Ewell*, Lead. Cas. 56; *Ryder v. Wombwell*, L. R. 4 Exch. 32; *McKanna v. Merry*, 61 Ill. 177; *Breed v. Judd*, 1 Gray (Mass.) 455; *Squier v. Hydliff*, 9 Mich. 274; *Wilhelm v. Hardman*, 13 Md. 144; *Jordan v. Coffield*, 70 N. C. 110; *Nicholson v. Spencer*, 11 Ga. 610. Board of four horses for six months, the principal use of which was in the business of an infant as a hackman, though the horses were occasionally used to carry his family out to drive, was held not necessary. *Merriam v. Cunningham*, 11 Cush. (Mass.) 40. Nor is a bicycle used to go to and from home to work. *Pyne v. Wood*, 145 Mass. 558, 14 N. E. Rep. 775. Livery for the servant of an infant officer in the army was held a necessary. *Hand v. Slaney*, 8 Term R. 578. And see *Coates v. Wilson*, 5 Esp. 152. But not cockades ordered for his soldiers. *Hand v. Slaney*, *supra*. The principles upon which the law determines what are necessities have been thus stated in an English case: "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral, and religious information may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence attendance may be the subject of an infant's contract. Then, the classes being established, the subject-matter

The question must therefore depend on the circumstances of each particular case, though there are some things, of course, which are obviously incapable of being deemed necessities. A wild animal, or a steam roller, or a railroad engine, cannot, under any circumstances, be deemed such. Nor can things intended for ornament, and not for use,<sup>33</sup> or merely for pleasure,<sup>34</sup> be regarded as necessary. Again, things may be of a useful or necessary character, but the quality or quantity supplied may take them out of the character of necessities.<sup>35</sup> Elementary text-books might be necessary to a law student; but not a rare edition, nor a great number of copies of a single book. Things necessary to a person in one station of life might not be necessary to a person in a different sta-

and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse, according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the ills with which he is afflicted; and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society; and a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. So contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself." *Chapple v. Cooper*, 13 Mees. & W. 252.

<sup>33</sup> *Peters v. Fleming*, 6 Mees. & W. 42; *McKanna v. Merry*, 61 Ill. 179.

<sup>34</sup> *McKanna v. Merry*, 61 Ill. 179; *Saunders v. Ott*, 1 McCord (S. C.) 572; *Beeler v. Young*, 1 Bibb (Ky.) 519. Horse, carriage, or bicycle not ordinarily a necessity. *House v. Alexander*, 105 Ind. 109, 4 N. E. Rep. 891; *Miller v. Smith*, 26 Minn. 248; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. Rep. 775; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Howard v. Simpkins*, 70 Ga. 322. A horse, however, may be necessary for health. Note 79, *supra*. Money furnished to enable an infant to take a necessary trip may be necessary, but not to take a trip for pleasure. *Breed v. Judd*, 1 Gray (Mass.) 455; *McKanna v. Merry*, 61 Ill. 177. Tobacco is *prima facie* not necessary. *Bryant v. Richardson*, 12 Jur. (N. S.) 300.

<sup>35</sup> *Burghart v. Angerstein*, 6 Car. & P. 690; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80; *Nicholson v. Spencer*, 11 Ga. 610.

tion. Again, things not usually necessary may become so from the circumstances of the infant. Medical attendance and expensive articles of food may ordinarily be dispensed with, but may become necessary in case of ill health.

Things with which an infant is already sufficiently supplied are not necessary.<sup>86</sup> An infant, when residing at home, and under the care of his father or guardian, and supported by him, is presumed to be sufficiently supplied, and is not liable even for necessities; and it even seems that this is so notwithstanding the poverty of his father.<sup>87</sup> It has been held that the fact that an infant is abundantly supplied with money, so that he can purchase necessities for cash if he chooses, is not equivalent to being supplied, and he will nevertheless be liable for necessities bought on credit; but there is authority to the contrary.<sup>88</sup>

*Must Concern His Person.*

The things furnished, to come within the term "necessaries," must concern the person of the infant, and not his estate. An infant, therefore, is not bound by contracts for things necessary to carry on a business into which he enters.<sup>89</sup> He is not liable for mate-

<sup>86</sup> *Barnes v. Toye*, 13 Q. B. Div. 410; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274; *McKanna v. Merry*, 61 Ill. 180; *Nicholson v. Willborn*, 13 Ga. 467; *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Burghart v. Angerstein*, 6 Car. & P. 690; *Perrin v. Wilson*, 10 Mo. 451; *Guthrie v. Murphy*, 4 Watts (Pa.) 80; note 85, *supra*.

<sup>87</sup> *Hoyt v. Casey*, 114 Mass. 397; *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Ewell*, Lead. Cas. 55; *Walling v. Toll*, 9 Johns. (N. Y.) 141; *Guthrie v. Murphy*, 4 Watts (Pa.) 80; *Angel v. McClellan*, 16 Mass. 28; *Decell v. Lewenthal*, 57 Miss. 331; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419; *Perrin v. Wilson*, 10 Mo. 451; *Trainer v. Trumbull*, 141 Mass. 530, 6 N. E. Rep. 761; *Jones v. Colvin*, 1 McMull. (S. C.) 14; *Elrod v. Myers*, 2 Head (Tenn.) 33; *Kraker v. Byram*, 13 Rich. Law (S. C.) 163; *Freeman v. Bridges*, 4 Jones, Law (N. C.) 4; *Connoly v. Hull*, 3 McCord (S. C.) 6.

<sup>88</sup> *Burghart v. Hall*, 4 Mees. & W. 727. But see *Rivers v. Greggs*, 5 Rich. Eq. (S. C.) 274; *Barnes v. Toye*, 13 Q. B. Div. 410.

<sup>89</sup> *House v. Alexander*, 105 Ind. 109, 4 N. E. Rep. 891; *Mason v. Wright*, 13 Metc. (Mass.) 306; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. Rep. 775; *Stern v. Meikleham*, 10 N. Y. Supp. 216; *Paul v. Smith*, 41 Mo. App. 275; *Decell v. Lewenthal*, 57 Miss. 331; *Whittingham v. Hill*, Cro. Jac. 494; *Decell v. Lewenthal*, 57 Miss. 331; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *State*

rials purchased and used for the erection of a house on his land,"<sup>20</sup> and it has even been held that he is not liable for the expense of repairing his dwelling house on a contract made by him therefor, although the repairs may have been necessary to prevent immediate and serious injury to the house.<sup>21</sup>

### *Money.*

Money, as such, is not regarded as necessary. "An infant," it was said in a New York case, "is not answerable for money borrowed, though expended by him for necessities; nor for money borrowed to buy necessities, unless it was actually so applied. And perhaps the infant is not answerable in that case, unless the lender either lays out the money himself, or sees it laid out, for necessities. But where this is done the infant is answerable for the money the same as he would have been for the necessities had they been directly furnished by the lender."<sup>22</sup>

### *Necessaries to Wife and Children.*

According to the weight of authority, a man is bound by law to properly support and care for his wife and children, and an infant is therefore liable under a contract created by law for necessities

v. Howard, 88 N. C. 680; Wood v. Losey, 50 Mich. 475, 15 N. W. Rep. 557; Dilk v. Keighley, 2 Esp. 480.

<sup>20</sup> Wornock v. Loar (Ky.) 11 S. W. Rep. 438; Freeman v. Bridges, 4 Jones, Law (N. C.) 1; Price v. Jennings, 62 Ind. 111. Nor is his property subject to a mechanic's lien therefor. Bloomer v. Nolan, 36 Neb. 51, 53 N. W. Rep. 1039.

<sup>21</sup> Phillips v. Lloyd (R. I.) 25 Atl. Rep. 909; Tupper v. Cadwell, 12 Metc. (Mass.) 559; Wallis v. Bardwell, 126 Mass. 366; West v. Gregg, 1 Grant (Pa.) Cas. 53. Nor on a contract for insurance of his property. New Hampshire Ins. Co. v. Noyes, 32 N. H. 345. Nor for attorney's fees in a suit to protect his property. Phelps v. Worcester, 11 N. H. 51. Contra, Epperson v. Nugent, 57 Miss. 45. Nor for a loan of money to pay off incumbrances. Bicknell v. Bicknell, 111 Mass. 265; Magee v. Welsh, 18 Cal. 155.

<sup>22</sup> Randall v. Sweet, 1 Denio (N. Y.) 460. And see Kilgore v. Rich, 83 Me. 305, 22 Atl. Rep. 176; Swift v. Bennett, 10 Cush. (Mass.) 436; Genereux v. Sibley (R. I.) 25 Atl. Rep. 345; Price v. Sanders, 60 Ind. 310; Haines v. Tarrant, 2 Hill (S. C.) 400; Conn v. Coburn, 7 N. H. 368; Beeler v. Young, 1 Bibb (Ky.) 519; Earle v. Peale, 1 Salk. 387. He may, however, be held liable in equity for money borrowed and expended by him for necessities. Price v. Sanders, 60 Ind. 310; Watson v. Cross, 2 Duv. (Ky.) 147; Hickman v. Hall, 5 Litt. (Ky.) 335; Beeler v. Young, 1 Bibb (Ky.) 521.

furnished his wife and children.<sup>83</sup> There is, however, some authority for the contrary view as to children.<sup>84</sup>

*Persons Supplying Infant Act at their Peril.*

Whether or not things supplied to an infant were necessities or not is to be determined by looking at the infant's actual circumstances, and not to his circumstances as they seemed or were believed to exist. A false impression which the infant may have conveyed to the tradesman as to his station and circumstances will not affect his liability. If a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than they really are, or if he supplies goods of a useful class, not knowing that the infant is already sufficiently supplied, he does so at his peril.<sup>85</sup>

*Question of Law or Fact.*

Difficulty has arisen in determining the respective provinces of the court and jury in ascertaining whether things supplied to an infant were necessities. The rule has been stated to be "that, whether articles of a certain kind, or certain subjects of expenditure, are or are not such necessities as an infant may contract for, is a matter of law, and for instruction by the court; but the question whether any particular things come under these classes, and the question also as to quantity, are generally matters of fact for the jury to determine."<sup>86</sup> Probably a clearer statement of the rule is that "whether the articles furnished are of a name and quality coming within the denomination of necessities is exclusively a question of law for the court, but the quantity—that is to say, to what

<sup>83</sup> *Contine v. Phillips*, 5 Har. (Del.) 428; *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480; *Price v. Sanders*, 60 Ind. 315; *Chapman v. Hughes*, 61 Miss. 339; *Chapple v. Cooper*, 13 Mees. & W. 252, 259; *Turner v. Frisby*, 1 Strange, 168; *People v. Moores*, 4 Denio (N. Y.) 520; *In re Ryder*, 11 Paige (N. Y.) 185; *Gilley v. Gilley*, 79 Me. 292, 9 Atl. Rep. 623; post, pp. 715, 778.

<sup>84</sup> *Kelly v. Davis*, 49 N. H. 176.

<sup>85</sup> *Brayshaw v. Eaton*, 7 Scott, at page 187; *Barnes v. Toye*, 13 Q. B. Div. 410; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419; *Davis v. Caldwell*, 12 Cush. (Mass.) 513; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274; *Monumental Ass'n v. Herman*, 33 Md. 131; *Perrin v. Wilson*, 10 Mo. 451; *Nicholson v. Spencer*, 11 Ga. 607.

<sup>86</sup> 1 Pars. Cont. 290.



extent the articles are necessary in the given case—is a question of fact for the jury.”<sup>97</sup>

*Express Contracts for Necessaries.*

To render an infant liable for necessaries it is not necessary to prove an express contract on his part. If necessaries are furnished him, the law will imply a promise on his part to pay for them.<sup>98</sup>

As to whether an infant can bind himself by an express contract there has been a conflict of opinion. It is well settled that he is not liable for any sum he may agree to pay, but only for what the necessaries are reasonably worth.<sup>99</sup> It has been said without qualification that an infant cannot bind himself by an express promise to pay a sum certain for necessaries; but, as we shall see, this is not true. It is certainly true, however, that he cannot bind himself to pay more than the necessaries are reasonably worth. Any contract, therefore, which is of such a nature that the consideration cannot be inquired into, must needs be held voidable. For this reason it has been held that an infant cannot bind himself, even for necessaries, by a bond with a penalty, nor by a promissory note or bill of exchange, nor by an account stated.<sup>100</sup> According to most

<sup>97</sup> Knowlton's Anson, Cont. 146, note. And see Bent v. Manning, 10 Vt. 225; Tupper v. Cadwell, 12 Metc. (Mass.) at page 563; Decell v. Lewenthal, 57 Miss. 331; Beeler v. Young, 1 Bibb (Ky.) 519; Glover v. Ott, 1 McCord (S. C.) 572; Grace v. Hale, 2 Humph. (Tenn.) 27; McKanna v. Merry, 61 Ill. 177; Jordan v. Coffield, 70 N. C. 110.

<sup>98</sup> Gay v. Ballou, 4 Wend. (N. Y.) 403. For the reasons explained in treating of offer and acceptance, however, the infant will not be liable if there is no intention to charge him when the necessaries are furnished; but if they are furnished with the expectation of payment, and not under such circumstances as to reasonably lead the infant to believe they are furnished gratuitously, he will be liable. Ante, pp. 24-29.

<sup>99</sup> Earle v. Reed, 10 Metc. (Mass) 387; Hyer v. Hyatt, 3 Cranch, C. C. 276. Fed. Cas. No. 6,977; Trainer v. Trumbull, 141 Mass. 530, 6 N. E. Rep. 761; Dubose v. Wheddon, 4 McCord (S. C.) 221; Locke v. Smith, 41 N. H. 346; Com. v. Hautz, 2 Pa. St. 333. And see the cases in the following notes.

<sup>100</sup> Williamson v. Watts, 1 Camp. 552; Trueman v. Hurst, 1 Term R. 40; Tirrill's Case, 2 Rolle, 271; Bartlett v. Emery, 1 Term R. 42n; Ingledew v. Douglas, 2 Starkie, 36; Ayliff v. Archdale, Cro. Eliz. 920; Mitchell v. Reynolds, 10 Mod. 85; Ex parte Margrett [1891] 1 Q. B. 413; Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33; Fenton v. White, 4 N. J. Law, 111; Beeler v. Young, 1 Bibb (Ky.) 519; McMinn v. Richards, 6 Yerg. (Tenn.) 9;

of the cases it seems that it is immaterial that the circumstances are such that the consideration for the contract can be inquired into in the particular instance; and that the contract is voidable if it is such that the consideration may, under some circumstances, not be open to inquiry. Some of the cases, for instance, hold a promissory note or bill of exchange given for necessities voidable even as between the immediate parties, though, under such circumstances, the consideration is open to inquiry, since it would not be open to inquiry as against a bona fide holder for value. It may be that a majority of the decided cases are to this effect, but it is doubtful. At any rate, there is in the modern cases a strong tendency to depart from the rule in all cases where the express contract and the parties to the action are such that the consideration may be inquired into; and to allow a recovery on the express contract to the extent of the reasonable value of the necessities furnished as the consideration.<sup>101</sup> A recovery has therefore been allowed on a bond given for necessities where, by statute, in the particular jurisdiction, the consideration for the bond could be inquired into;<sup>102</sup> and on promissory notes which had not been negotiated so as to cut off inquiry into the consideration.<sup>103</sup> "So long as the contract remains in a form to be open to all defenses," said the Vermont court, "we see no reason whatever why the party should be driven out of court upon mere form."<sup>104</sup>

#### **SAME—RATIFICATION AND AVOIDANCE.**

**118. Where the contract of an infant is voidable, he may ratify it, and thereby render it binding; or he may disaffirm it, and thereby render it void.**

*Bouchell v. Clary*, 3 Brev. (S. C.) 194; *McCrillis v. How*, 3 N. H. 348; *Henderson v. Fox*, 5 Ind. 489; *Ayers v. Burns*, 87 Ind. 245; *Morton v. Stewart*, 5 Ill. App. 533; *Parsons v. Keys*, 43 Tex. 557; *Story*, Cont. § 131.

<sup>101</sup> *Reeve*, Dom. Rel. 290; *Stone v. Dennison*, 13 Pick. (Mass.) 1; *Earle v. Reed*, 10 Metc. (Mass.) 387; *Bradley v. Pratt*, 23 Vt. 378; *Dubose v. Wheddon*, 4 McCord (S. C.) 221; *Aaron v. Harley*, 8 Rich. Law (S. C.) 26; *Conn v. Coburn*, 7 N. H. 368; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101.

<sup>102</sup> *Guthrie v. Morris*, 22 Ark. 411.

<sup>103</sup> See cases cited in note 101, *supra*.

<sup>104</sup> *Bradley v. Pratt*, 23 Vt. 378.

**119. A promise to perform an isolated act, or a contract that is wholly executory, is invalid unless ratified; but an executed contract, or a contract involving continuous rights, duties, and liabilities, is valid until rescinded.**

Where the contract of an infant is voidable only, he may ratify it on attaining his majority, and thereby assume the rights and liabilities arising from it; or he may, before ratification, but not afterwards, disaffirm or repudiate it, and thereby escape any liability under it. The reader will remember that such a ratification is an illustration of the class of cases in which a past consideration will support a subsequent promise.<sup>105</sup>

The ratification necessary to render a person liable on contracts made during infancy differs in correspondence with a certain difference in kind in the contracts. Some contracts are valid unless they are rescinded; and acts inconsistent with an intention to rescind, or failure to rescind for an unreasonable time, will, as a rule, be equivalent to a ratification. Other contracts are invalid unless they are ratified. It will make the subject clearer to consider this difference, at the risk of some repetition, when we come to consider what amounts to a ratification or disaffirmance.

*When Disaffirmance Necessary.*

The rule seems to be that, where an infant acquires an interest in permanent property, to which obligations attach, or enters into a contract which involves continuous rights and duties, benefits and liabilities, and takes benefits under the contract, he may become bound, unless he expressly disaffirms the contract. The most common illustration of such contracts is in the case of conveyances of land. An infant's deed is valid, and gives a good title to the grantee, until it is disaffirmed by the infant; and the same is true in the case of executed sales of chattels with delivery, or any other contract which has been executed by the infant.<sup>106</sup>

<sup>105</sup> Ante, p. 202.

<sup>106</sup> 2 Kent, Comm. 236; *Cole v. Pennoyer*, 14 Ill. 158; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. Rep. 539; *Irvine v. Irvine*, 9 Wall. 617; *Dixon v. Merritt*, 21 Minn. 196; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. Rep. 283; *Rogers v. Berry*, 10 Johns. (N. Y.) 132; *Scranton v. Stewart*,

As further illustrating this rule, an infant lessee, who occupies the premises after reaching his majority, is liable for arrears of rent which accrued during his minority.<sup>107</sup> Persons who have become possessed of shares in a corporation during infancy, if they hold them after they reach their majority, are liable for calls which accrued while they were infants.<sup>108</sup> An infant may become a partner, and at common law may be entitled to benefits, though not liable for debts, arising from the partnership during his infancy; though equity would not allow him to claim the benefits without being charged with the losses. Unless, on attainment of majority, there is an express rescission and disclaimer of the partnership, the infant will be liable for losses accruing after he became of age. By holding himself out as a partner he contracts a continual obligation, and that obligation remains until he puts an end to it by a disclaimer.<sup>109</sup> And so, where shares in a corporation were assigned to an infant who attained his majority some months before an order was made for winding up the company, it was held that, in the absence of any disclaimer of the shares, he was liable as a contributory.<sup>110</sup>

*When Ratification is Necessary.*

The cases of which we have just been speaking, and which require an express disclaimer to avoid the effect of the contract, are all

52 Ind. 68; *Green v. Green*, 69 N. Y. 553; *Illinois Land, etc., Co. v. Bonner*, 75 Ill. 315.

<sup>107</sup> *Rolle*, Abr. 731.

<sup>108</sup> *Northwestern R. Co. v. McMichael*, 5 Exch. 114. It was said in this case: "They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have thereby been placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, \* \* \* unless they have elected to waive or disagree the purchase altogether, either during infancy or at full age, at either of which times it is competent for an infant to do so."

<sup>109</sup> *Goode v. Harrison*, 5 Barn. & Ald. 159; *Miller v. Sims*, 2 Hill (S. C.) 479.

<sup>110</sup> *Lumsden's Case*, 4 Ch. App. 31.

cases in which an interest was acquired in permanent property to which liabilities attached, or in which the contract entered into by the infant involved continuous rights, duties, and liabilities. If, on the other hand, the promise of the infant is to perform some isolated act, or if the contract is wholly executory, it will not be binding on him unless he expressly ratifies it on coming of age.<sup>111</sup> As we have seen, if a person who has entered into a partnership during his minority fails to disaffirm the agreement after reaching his majority, and so holds himself out as a partner, he will be liable for debts of the firm contracted after he became of age; but he will not be liable for debts of the firm contracted during his minority, unless he ratifies them.<sup>112</sup> Some courts hold that his ratification of the partnership agreement is a ratification of debts of the firm contracted during his minority,<sup>113</sup> and this would seem the proper doctrine; but the contrary has been held.<sup>114</sup>

#### SAME—WHO MAY AVOID CONTRACT.

120. The privilege of infancy is personal to the infant, and he alone can take advantage of it during his life and sanity.

121. On his death, or if he becomes insane, his contracts may be avoided by his heirs, personal representatives, or conservator or guardian.

122. The other party to the contract, not being himself under disability, is bound if the infant chooses to hold him.

The privilege of infancy is intended to protect the infant, and is conferred for his benefit only. It is a personal privilege, and dur-

<sup>111</sup> *Whitney v. Dutch*, 14 Mass. 460; *Carrell v. Potter*, 23 Mich. 379. See, also, post, p. 247; *Savage v. Lichlyter* (Ark.) 26 S. W. Rep. 12.

<sup>112</sup> *Tobey v. Wood*, 123 Mass. 88; *Todd v. Clapp*, 118 Mass. 495; *Bush v. Linthicum*, 59 Md. 344.

<sup>113</sup> *Salinas v. Bennett*, 33 S. C. 285, 11 S. E. Rep. 968; *Miller v. Sims*, 2 Hill (S. C.) 479.

<sup>114</sup> *Mehlhop v. Rae* (Iowa) 57 N. W. Rep. 650; *Crabtree v. May*, 1 B. Mon. (Ky.) 289; *Minock v. Shortridge*, 21 Mich. 304. And see cases cited in note 112, supra.

ing his life and sanity he alone can take advantage of it.<sup>115</sup> It is even held that his guardian cannot avoid his contracts for him, though there is some dictum to the contrary.<sup>116</sup> On his death, however, or if he becomes insane, his contracts may be avoided by his heirs,<sup>117</sup> his personal representatives,<sup>118</sup> or his guardian or conservator.<sup>119</sup> The reason of the rule, it has been said, extends only to them because the privilege is conferred for his sole benefit. While living, he should be the exclusive judge of that benefit, and when dead those alone should interfere who legally represent him. Could his contracts be avoided by third persons, the principle would operate, not for his, but for their, benefit; not when he chose to avail himself of his privileges, but when strangers elected to

<sup>115</sup> *Keane v. Boycott*, 2 H. Bl. 511, *Ewell's Cas.* 17; *Holt v. Ward Clarenceux*, 2 Strange, 937; *Nightingale v. Withington*, 15 Mass. 272; *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. Rep. 773; *Harris v. Ross*, 112 Ind. 314, 13 N. E. Rep. 873; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Baldwin v. Rosier*, 48 Fed. Rep. 810; *Hooper v. Payne*, 94 Ala. 223, 10 South. Rep. 431; *Chambers v. Ker* (Tex.) 24 S. W. Rep. 1118; *Dentler v. O'Brien*, 56 Ark. 49, 19 S. W. 111; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. Rep. 772; *Garner v. Cook*, 30 Ind. 361; *Oliver v. Houdlet*, 13 Mass. 237; *Van Bramer v. Cooper*, 2 Johns. (N. Y.) 279; *Alsworth v. Cordtz*, 31 Miss. 32. In an action, for instance, for enticing away a servant from plaintiff's service, the defendant cannot escape liability by showing that the servant was an infant, and was therefore not bound by his contract with the plaintiff. *Keane v. Boycott*, *supra*. An auctioneer may refuse to accept the bid of an infant. *Kinney v. Showdy*, 1 Hill (N. Y.) 544. The surety on a bond given by an infant, and afterwards disaffirmed by him, has been held liable. *Kyger v. Sipe*, 89 Va. 507, 16 S. E. Rep. 627. As to insanity of the principal in a bond and liability of the sureties, see post, p. 272, note 228.

<sup>116</sup> See *Oliver v. Houdlet*, 13 Mass. 240; *Irvine v. Crockett*, 4 Bibb (Ky.) 437; *Chandler v. Simmons*, 97 Mass. 508; *Stafford v. Roof*, 9 Cow. (N. Y.) 626.

<sup>117</sup> *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Harvey v. Briggs*, 68 Miss. 60, 8 South. Rep. 274; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372; *Veal v. Fortson*, 57 Tex. 487; *Ferguson v. Bell*, 17 Mo. 351; *Levering v. Heighe*, 2 Md. Ch. 81, 88; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 248.

<sup>118</sup> *Parsons v. Hill*, 8 Mo. 135; *Hastings v. Dollarhide*, 24 Cal. 207; *Person v. Chase*, 37 Vt. 650; *Jefford v. Ringgold*, 6 Ala. 547; *Hussey v. Jewett*, 9 Mass. 100; *Smith v. Mayo*, 9 Mass. 62; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 248.

<sup>119</sup> *Chandler v. Simmons*, 97 Mass. 508.

do it. This would render the rule unreasonable, and mar the whole symmetry of the law upon the subject of infancy.

The other party to the contract, not being himself under a disability to contract, cannot avoid it. He is bound if the infant chooses to hold him by ratifying the contract on becoming of age.<sup>120</sup> A court of equity, however, will not grant an infant specific performance of a contract by the adult.<sup>121</sup> Of course, those contracts which are held void, and not merely voidable, at the infant's option, are of no effect at all, and can bind neither party.

#### SAME—TIME OF AVOIDANCE.

123. Executory contracts, or executed contracts relating to personalty, may be avoided by an infant either before or after attaining his majority; but conveyances of land cannot be disaffirmed during minority, though he may enter and take the profits.

124. As a rule, mere lapse of time after attaining his majority will not bar an infant's disaffirmance of his executory contract, but in a few states he is required to disaffirm within a reasonable time.

125. As a rule, executed contracts must be disaffirmed within a reasonable time after attaining majority; but in some states it is held that the right to avoid a conveyance of land is not barred by acquiescence for any period short of that prescribed by the statute of limitations.

An infant's executory contract may be avoided by him at any time, either before or after attaining his majority, by refusing to perform it, and pleading his infancy when sued for breach of the contract.<sup>122</sup>

<sup>120</sup> *Holt v. Ward* Clarendoux, 2 Strange, 937; *Thompson v. Hamilton*, 12 Pick. (Mass.) 425; *Hunt v. Peake*, 5 Cow. (N. Y.) 475; *Field v. Herrick*, 101 Ill. 110.

<sup>121</sup> *Flight v. Bolland*, 4 Russ. 298.

<sup>122</sup> *Reeves*, Dom. Rel. 254; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. Rep. 420; *Adams v. Beall*, 67 Md. 53, 8 Atl. Rep. 664. An infant may avoid his contracts for personal services during his minority. *Vent v. Osgood*, 19 Pick.

In the case of executed contracts a distinction is made between contracts relating to his land and those relating to his personalty. A deed of land executed by an infant cannot be disaffirmed during his minority. He may enter on the land and take the profits until the time arrives when he has the legal capacity to affirm or disaffirm the deed; but the deed is not rendered void by the entry. It may still be affirmed after he reaches his majority.<sup>123</sup>

The rule, however, does not apply to a sale and manual delivery of chattels by an infant. Such a contract may be avoided by him while he is still an infant.<sup>124</sup> In a New York case it was said: "The general rule is that an infant cannot avoid his contract, executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant, or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive. \* \* \* Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases, and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true

(Mass.) 572; *Ray v. Haines*, 52 Ill. 485; *Adams v. Beall*, 67 Md. 53, 8 Atl. Rep. 664; *Gaffney v. Hayden*, 110 Mass. 137; *Vehue v. Pinkham*, 60 Me. 142; *Whitmarsh v. Hall*, 8 Denio (N. Y.) 375.

<sup>123</sup> *Welch v. Bunce*, 83 Ind. 382; *Zouch v. Parsons*, 3 Burrows, 1794; *Irvine v. Irvine*, 5 Minn. 61; *Hastings v. Dollard*, 24 Cal. 195; *Bool v. Mix*, 17 Wend. (N. Y.) 119; *McCormick v. Leggett*, 8 Jones (N. C.) 425; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Baker v. Kennett*, 54 Mo. 88. An infant, however, may, before attaining his majority, plead infancy in a suit to foreclose a mortgage on land. *Schneider v. Stahlr*, 20 Mo. 269.

<sup>124</sup> *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Zouch v. Parsons*, 3 Burrows, 1794; *Adams v. Beall*, 67 Md. 53, 8 Atl. Rep. 664; *Shipman v. Horton*, 17 Conn. 481; *Riley v. Mallory*, 33 Conn. 207; *Willis v. Twambly*, 13 Mass. 204; *Carr v. Clough*, 26 N. H. 280; *Chapin v. Shafer*, 49 N. Y. 407; *Towle v. Dresser*, 73 Me. 252; *Hoyt v. Wilkinson*, 57 Vt. 404; *Carpenter v. Carpenter*, 45 Ind. 142; *Cogley v. Cushman*, 16 Minn. 397; *Price v. Furman*, 27 Vt. 268.



rule, then, appears to me to be that, where the infant can enter and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately."<sup>125</sup>

The rule is very general, almost universal, that an infant may avoid any contract in relation to his personal property before he is of age.<sup>126</sup> Some courts have held that he cannot disaffirm a partnership agreement during his minority, so as to recover what he has put into the firm, but must wait until he attains his majority.<sup>127</sup> Other courts hold the contrary, on the ground that it is a contract in relation to his personalty, and that all contracts of an infant in relation to personal property may be disaffirmed during his minority.<sup>128</sup>

As to whether a contract must be disaffirmed by an infant within a reasonable time after he attains his majority, the authorities are conflicting. In the case of executory contracts requiring ratification to render them binding, the right to avoid them cannot be barred by mere silence, without more. It may be otherwise where the circumstances are such as to make it the infant's duty to speak, for in such a case silence or acquiescence may amount to a ratification.<sup>129</sup>

In the case of those contracts which require express rescission after the infant becomes of age,<sup>130</sup> such as conveyances of land, sales and delivery of chattels, and the like, the infant must, according

<sup>125</sup> *Stafford v. Roof*, *supra*.

<sup>126</sup> See *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. Rep. 12 (collecting cases); *Rice v. Boyer*, 108 Ind. 472, 9 N. E. Rep. 420; *Hoyt v. Wilkinson*, 57 Vt. 404; *Price v. Furman*, 27 Vt. 268; *Willis v. Twambly*, 13 Mass. 204; *Stafford v. Roof*, 9 Cow. (N. Y.) 628; *Boal v. Mix*, 17 Wend. (N. Y.) 119; *Petrie v. Williams* (Sup.) 23 N. Y. Supp. 237; *Cogley v. Cushman*, 16 Minn. 307 (Gil. 354).

<sup>127</sup> *Dunton v. Brown*, 31 Mich. 182; *Armitage v. Widoe*, 36 Mich. 130; *Bush v. Linthicum*, 59 Md. 844 (but see *Adams v. Beall*, 67 Md. 53, 8 Atl. Rep. 664).

<sup>128</sup> *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. Rep. 12 (collecting cases); *Adams v. Beall*, 67 Md. 53, 8 Atl. Rep. 664.

<sup>129</sup> *Ante*, p. 242; *post*, p. 251.

<sup>130</sup> *Ante*, p. 240.

to the weight of authority, disaffirm the contract within a reasonable time after he attains his majority, or be held to have ratified it, and to be barred from avoiding it.<sup>121</sup> Many courts, however, have held that a conveyance of land by an infant need not be disaffirmed within any period short of that prescribed by the statute of limitations, and that acquiescence for any shorter time will not bar his right to avoid it.<sup>122</sup> As to conveyances of land, therefore, there is a direct conflict in the decisions, and the law differs in the various states.

It is provided by statute in some states that an infant is bound on all his contracts unless he disaffirms them within a reasonable time.<sup>123</sup>

#### SAME—WHAT AMOUNTS TO A RATIFICATION.

126. In some jurisdictions, by statute, ratification of a contract by an infant must, subject to specified exceptions, be in writing, signed by him or his agent.

127. In the absence of such a provision, ratification may be by an express new promise, orally or in writing; or, according to the better opinion, it may be implied from declarations or conduct clearly showing an intention to be bound.

<sup>121</sup> *Delano v. Blake*, 11 Wend. (N. Y.) 85; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. Rep. 233 (collecting the cases pro and con); *Bigelow v. Kinney*, 3 Vt. 353; *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. Rep. 114; *Amey v. Cockey*, 73 Md. 297, 20 Atl. Rep. 1071; *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. Rep. 468; *Sanders v. Bennett* (Ky.) 1 S. W. Rep. 436; *Scott v. Buchanan*, 11 Humph. (Tenn.) 467; *Aldrich v. Funk*, 1 N. Y. Supp. 543; *Ward v. Laverty*, 19 Neb. 429, 27 N. W. Rep. 393; *Thormaehlen v. Kaepfel*, (Wis.) 56 N. W. Rep. 1089; *Kline v. Beebe*, 6 Conn. 506. An infant's delay of less than six months after majority in avoiding a deed of land, with knowledge that purchasers from his grantee are making improvements, does not estop him. *Bundle v. Spencer*, 67 Mich. 189, 34 N. W. Rep. 548.

<sup>122</sup> *Drake's Lessees v. Ramsay*, 5 Ohio, 251; *Prout v. Wiley*, 28 Mich. 164; *Lacy v. Pixler* (Mo.) 25 S. W. Rep. 206; *Sims v. Everhardt*, 102 U. S. 300; *Wills v. Seixas*, 24 Fed. Rep. 82; *Richardson v. Pate*, 93 Ind. 432.

<sup>123</sup> *Leacox v. Griffith*, 76 Iowa, 89, 40 N. W. Rep. 109; *Mehlhop v. Rae* (Iowa) 57 N. W. Rep. 650; *Hegler v. Faulkner*, 14 Sup. Ct. Rep. 779 (under Nebraska statute); *Johnson v. Storie*, 32 Neb. 610, 49 N. W. Rep. 371.

**Acts, for instance, inconsistent with the nonexistence of the contract, such as the sale or use of property purchased, will amount to a ratification.**

**128. The promise must be made or the acts done by the infant understandingly, and with knowledge of his rights.**

In some jurisdictions it is expressly declared by statute that, with specified exceptions, no action shall be maintained on any contract made by an infant, unless he, or some person lawfully authorized, ratified it in writing after he attained his majority.<sup>124</sup> In the absence of such a provision, ratification may either be by an express new promise, made orally or in writing, or it may be implied from acts or declarations clearly showing an intention to recognize the contract, and to be bound by it. The new promise, whether in writing or oral, or evidenced by conduct, must be clear and unequivocal, and must show an intention to be bound.<sup>125</sup>

A mere acknowledgment of the contract, without a promise to be bound, express or implied, is not sufficient.<sup>126</sup> Where there is a new promise, it must be made to the other party or his agent;<sup>127</sup> and if it is not absolute, but conditional,—as, for instance, where it is a promise to pay or otherwise perform when able,—the condition must be fulfilled before any liability attaches. In the case mentioned no recovery could be had without proof of ability to perform.<sup>128</sup>

It is very generally held that to render a new promise binding it must be made with knowledge of the facts, including, it has been

<sup>124</sup> *Bird v. Swain*, 79 Me. 529, 11 Atl. Rep. 421.

<sup>125</sup> *Whitney v. Dutch*, 14 Mass., at page 460; *Carrell v. Potter*, 23 Mich. 379. And see notes 142-147, *infra*.

<sup>126</sup> *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Kendrick v. Niesz*, 17 Colo. 506, 30 Pac. Rep. 245; *Hale v. Gerrish*, 8 N. H. 374. As we shall presently see, however, the promise need not be in words, but may be implied from conduct showing an intention to be bound.

<sup>127</sup> *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Bigelow v. Grannis*, 2 Hill (N. Y.) 120.

<sup>128</sup> *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Kendrick v. Niesz*, 17 Colo. 506, 30 Pac. Rep. 245; *Thompson v. Lay*, 4 Pick. (Mass.) 48; *Proctor v. Sears*, 4 Allen (Mass.) 95.

said, the fact that there is no liability on the original contract;<sup>140</sup> and even where the ratification is by conduct the person must have acted understandingly.<sup>141</sup>

There need be no fresh consideration for the new promise, for, as we have seen, this is one of the cases in which a past consideration is sufficient.<sup>142</sup>

#### *Implied Ratification.*

Unless a statute so requires, an express promise in terms is not necessary in order to constitute ratification of an obligation incurred during infancy. "Where the declarations or acts of the individual after becoming of age," said the Vermont court, "fairly and justly lead to the inference that he intended to and did recognize and adopt as binding an agreement executory on his part, made during infancy, and intended to pay the debt then incurred, we think it is sufficient to constitute ratification, provided the declarations were freely and understandingly made, or the acts in like manner performed, and with knowledge that he was not legally liable."<sup>143</sup>

The courts seem to go much further than this dictum, and to hold substantially that any intelligent conduct by a person, after attaining his majority, inconsistent with the nonexistence of a contract, executory or executed, will, as a rule, amount to an affirmance of the contract.<sup>144</sup> If, for instance, an infant takes a lease, and after

<sup>140</sup> *Harner v. Killing*, 5 Esp. 103; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Thing v. Libbey*, 16 Me. 55; *Trader v. Lowe*, 45 Md. 1; *Smith v. Mayo*, 9 Mass. 62; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Reed v. Boshears*, 4 Sneed (Tenn.) 118; *Norris v. Vance*, 3 Rich. (S. C.) 164; *Burdett v. Williams*, 30 Fed. Rep. 697. But see *American Mortgage Co. v. Wright* (Ala.) 14 South. Rep. 399; *Morse v. Wheeler*, 4 Allen (Mass.) 570. In the absence of anything to show the contrary, it is to be presumed that at the time of making the new promise the person was aware of his rights. *Taft v. Sergeant*, 18 Barb. (N. Y.) 321.

<sup>141</sup> Note 142, *infra*.

<sup>142</sup> *Ante*, p. 202.

<sup>143</sup> *Hatch v. Hatch*, 60 Vt. 160, 13 Atl. Rep. 791. And see *Kendrick v. Niesz*, 17 Colo. 506, 30 Pac. Rep. 245; *Baker v. Kennett*, 54 Mo. 88; *Wheaton v. East*, 5 Yerg. (Tenn.) 40, 62; *Emmons v. Murray*, 16 N. H. 385; *Drake v. Wise*, 36 Iowa, 476; *Hale v. Gerrish*, 8 N. H. 374; *Middleton v. Hoge*, 5 Bush (Ky.) 478 (collecting cases). See *Ewell*, *Lead. Cas.* 173-180.

<sup>144</sup> *Henry v. Root*, 33 N. Y. 526 (collecting cases). Where an infant buys

Becoming of age recognizes it by occupying under it, or if, having given a lease, he accepts rent after becoming of age, his conduct amounts to a ratification.<sup>144</sup> So, also, a purchase of land or chattels by an infant is ratified if he retains and uses the property for an unreasonable time after attaining his majority, or if he sells it to a third person, or otherwise disposes of it.<sup>145</sup> The receipt of, or a suit to recover, the purchase money of property sold by him, or suit to enforce any other kind of contract, would amount to a ratification of the contract.<sup>146</sup> Where an infant has sold land or goods, or given a mortgage, his receipt of the purchase money or the

land, and gives a mortgage to secure the purchase money, a sale and conveyance of the land after he becomes of age is a ratification of the mortgage. *Necker v. Koehn*, 21 Neb. 559, 32 N. W. Rep. 583. And see *Callis v. Day*, 38 Wis. 643. Acceptance of part of the proceeds of a sale under a deed of trust given while an infant. *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. Rep. 542. Taking releases of part of premises mortgaged during infancy, and acquiescence for two years. *Wilson v. Darragh*, 7 N. Y. Supp. 810.

<sup>144</sup> *Ashfield v. Ashfield*, W. Jones, 157; *Paramour v. Yardley*, Plowd. 546.

<sup>145</sup> *Henry v. Root*, 33 N. Y. 526; *Lawson v. Lovejoy*, 8 Me. 405; *Boyd v. Boyden*, 9 Metc. (Mass.) 519; *Robbins v. Eaton*, 10 N. H. 561; *Hubbard v. Cummings*, 1 Me. 11; *Boody v. McKenney*, 23 Me. 517; *Ellis v. Alford*, 64 Miss. 8, 1 South. Rep. 155; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. Rep. 538; *Cheshire v. Barrett*, 4 McCord (S. C.) 241; *Deason v. Boyd*, 1 Dana (Ky.) 45; *Schropshire v. Burns*, 46 Ala. 108; *Aldrich v. Grimes*, 10 N. H. 194; *Dana v. Coombs*, 6 Greenl. (Me.) 89; *Armfield v. Tate*, 7 Ired. (N. C.) 258; *Callis v. Day*, 38 Wis. 643. This is expressly declared by statute in some states. See *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. Rep. 312. Retaining property after tendering it on disaffirmance, and on the other's refusal to receive it, is not a ratification. *House v. Alexander*, 105 Ind. 109, 4 N. E. Rep. 891. And see *Scott v. Scott*, 29 S. C. 414, 7 S. E. Rep. 811. The retention by a person, after becoming of age, of material furnished him during his minority in the construction of his house, is not a ratification of his purchase of the material, for he cannot return it. *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. Rep. 1039.

<sup>146</sup> *Morrill v. Aden*, 19 Vt. 505; *Ferguson v. Bell*, 17 Mo. 347; *Pursley v. Harp*, 17 Iowa, 310. As we have seen, however, in order that joinder by an infant in a suit shortly after becoming of age may amount to a ratification of a contract, he must do so intelligently. *Burdett v. Williams*, 30 Fed. Rep. 697. Where an infant takes a deed and gives back a purchase-money mortgage, and the property is sold under the mortgage, the infant, after his majority, by bringing ejectment against the purchaser, not only affirms the deed, but the mortgage. *Kennedy v. Baker* (Pa. Sup.) 28 Atl. Rep. 252.

money secured, in whole or in part, after he becomes of age, amounts to a ratification.

Generally speaking, the act relied upon as a ratification must show an intention to affirm the contract; but the decisions are not in accord as to what acts are sufficient to show such an intention. Disposing of the property received under the contract, and the other acts above mentioned, would clearly show such intention; but where an infant has executed a conveyance, a mere offer, after attaining his majority, to execute a confirmatory deed if the other party will pay the balance of the purchase money, which offer is refused, clearly could not be regarded as a ratification of the sale and conveyance.<sup>147</sup>

Mere silence or acquiescence after becoming of age, without more, does not, as a rule, amount to a ratification.<sup>148</sup> The reason is that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him, as a duty to others, to act speedily. It is otherwise where the contract is one which requires disaffirmance, and there is a failure to disaffirm for an unreasonable time, under such circumstances as to lead others to act to their prejudice.<sup>149</sup>

<sup>147</sup> *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. Rep. 906. It has even been held that when a note executed by an infant remains in part unpaid, a mere acknowledgment of the debt, or payment of interest or part of the principal, by the infant after becoming of age, is not a binding affirmance. *Kendrick v. Niesz*, 17 Colo. 506, 30 Pac. Rep. 245. Contra, *American Mortgage Co. v. Wright* (Ala.) 14 South. Rep. 399. So, where land has been purchased, and installment notes given by an infant, it has been held that payment of some of them after becoming of age is not of itself a ratification of the contract. *Land Co. v. Sanford* (Tex.) 24 S. W. Rep. 587. But the recital by a person, in a mortgage executed after attaining majority, that it is subject to a mortgage executed during infancy, is a ratification of the prior mortgage, and renders it a prior lien. *Ward v. Anderson*, 111 N. C. 115, 15 S. E. Rep. 933.

<sup>148</sup> *Durfee v. Abbott*, 61 Mich. 471, 68 N. W. Rep. 521; *Irvine v. Irvine*, 9 Wall. 618; *Tyler v. Fleming*, 68 Mich. 185, 35 N. W. Rep. 902; *Hill v. Nelms*, 86 Ala. 442, 5 South. Rep. 796. But see *Delano v. Blake*, 11 Wend. (N. Y.) 85; ante, p. 248.

<sup>149</sup> *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. Rep. 805; *Lacy v. Pixler* (Mo.) 25 S. W. Rep. 206; *Dolph v. Hand* (Pa. Sup.) 27 Atl. Rep. 114; *Wheaton v. East*, 5 Yerg. 41, 62; *Hartman v. Kendall*, 4 Ind. 403; *Wallace v. Lewis*, 4 Har. (Del.) 80.

**SAME—WHAT AMOUNTS TO DISAFFIRMANCE.**

**129. A contract is disaffirmed by any conduct which is inconsistent with the existence of the contract, and shows an intention not to be bound by it.**

Disaffirmance, like ratification, may be implied, and it will generally be implied from conduct clearly inconsistent with the existence of the contract.<sup>150</sup> Where, for instance, a person who has sold and conveyed or mortgaged land or goods while an infant, sells, leases, or mortgages the same to another after becoming of age, this is a disaffirmance of his contract.<sup>151</sup> An action by a person, after becoming of age, to recover goods or land sold by him during his minority, is a disaffirmance of the sale;<sup>152</sup> and a contract is disaffirmed by merely pleading infancy when suit is brought

<sup>150</sup> *Pyne v. Wood*, 145 Mass. 558, 14 N. E. Rep. 775; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Dallas v. Hollingsworth*, 3 Ind. 537.

<sup>151</sup> *Tucker v. Moreland*, 10 Pet. 58; *Mustard v. Wohlford*, 15 Grat. (Va.) 329; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. Rep. 173; *Corbett v. Spencer*, 63 Mich. 731, 30 N. W. Rep. 385; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. Rep. 539; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. Rep. 462; *Chapin v. Shafer*, 49 N. Y. 407; *Peterson v. Laik*, 24 Mo. 541; *Cresinger v. Welch*, 15 Ohio, 156; *Pitcher v. Layrock*, 7 Ind. 398; *McGan v. Marshall*, 7 Humph. (Tenn.) 121. In some jurisdictions a person is not allowed to convey land which is in the adverse possession of another. Here, therefore, an infant cannot avoid his deed of land by a second deed, executed while his first grantee or another is in the adverse possession of the land. He must first make an entry. *Harrison v. Adcock*, 8 Ga. 68. See *Bool v. Mix*, 17 Wend. (N. Y.) 133.

<sup>152</sup> *Clark v. Tate*, 7 Mont. 171, 14 Pac. Rep. 761; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. Rep. 906; *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 4; *Stotts v. Leonhard*, 40 Mo. App. 336; *Scott v. Buchanan*, 11 Humph. (Tenn.) 469; *Hughes v. Watson*, 10 Ohio, 134. Where, however, the action is based on the assumption that defendant is wrongfully in possession, as in the case of ejectment, the weight of authority seems to require that there shall have been some previous act of disaffirmance on the part of the infant, for until disaffirmance defendant is rightfully in possession. See *Law v. Long*, 41 Ind. 586; *McClanahan v. Williams* (Ind. Sup.) 35 N. E. Rep. 807; *Bool v. Mix*, 17 Wend. (N. Y.) 135; *Clawson v. Doe*, 5 Blackf. (Ind.) 300; *Wallace v. Lewis*, 4 Har. (Del.) 75.

against him to enforce it. Illustrations might be multiplied, but those mentioned are sufficient to show that all that is required for a disaffirmance is some act clearly showing an intention not to be bound by the contract.

At one time disaffirmance of a deed of land was required to be by some act as high and solemn as the deed, and the doctrine has been recognized by the supreme court of the United States and some of the state courts; but, according to the weight of authority, this solemnity is no longer necessary, and a deed may be effectually avoided by any acts or declarations disclosing an unequivocal intent to repudiate it.<sup>153</sup>

#### **SAME—EXTENT OF RATIFICATION OR DISAFFIRMANCE.**

**130. The ratification or disaffirmance must be in toto. The contract cannot be ratified or disaffirmed in part only.**

The disaffirmance or ratification must go to the whole contract. An infant cannot ratify a part which he deems for his benefit, and repudiate the rest.<sup>154</sup> He cannot, for instance, ratify a lease to himself, and avoid a covenant in it to pay rent; nor can he hold lands conveyed to him in exchange, and avoid the transfer of those with which he parted;<sup>155</sup> nor can he hold land conveyed to him, and repudiate a mortgage given at the time as part of the same transaction to secure the purchase money.<sup>156</sup>

As a rule, a person cannot retain property purchased by him during infancy, and repudiate the contract under which he received it; nor can he disaffirm a sale by him, and retain the consideration received; but as to this there is much conflict, and we must go into the subject at some length.

<sup>153</sup> *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. Rep. 539 (collecting cases). And see note 151, *supra*.

<sup>154</sup> *Badger v. Phinney*, 15 Mass. 359; *Bigelow v. Kinney*, 3 Vt. 353; *Lowrey v. Drake*, 1 Dana (Ky.) 46.

<sup>155</sup> *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. Rep. 538.

<sup>156</sup> *Hubbard v. Cummings*, 1 Me. 11; *Necker v. Koehn*, 21 Neb. 559, 32 N. W. Rep. 583; *Bigelow v. Kinney*, 3 Vt. 353; *Heath v. West*, 28 N. H. 108; *Young v. McKee*, 13 Mich. 556; *Skinner v. Maxwell*, 66 N. C. 45; *Cogley v. Cushman*, 16 Minn. 402 (Gil. 354); *Callis v. Day*, 38 Wis. 643.



**SAME—RETURN OF CONSIDERATION.**

131. An infant may disaffirm his executory contract without first returning the consideration he has received.<sup>157</sup>

132. If the contract has been executed by him, he cannot avoid it, and recover what he has paid, or for what he has done, without returning the consideration if he has it; but, by the weight of authority, if he has squandered or otherwise disposed of it during his minority, it is otherwise.

**EXCEPTIONS**—(a) Though the infant has the consideration, he may effectually disaffirm his executed contract without its return as a condition precedent, if he does not affirmatively seek relief; as, for instance, where he disaffirms his conveyance of land by conveying to another.

(b) Some courts hold that an infant cannot recover what he has paid, or for what he has done, under a contract by which he has received a substantial benefit, unless he can and does place the other party in statu quo. This probably does not apply to his conveyances of land.

As we have just stated, when a person avoids a contract made by him during his minority, he must, as a rule, return the consideration he has received.<sup>158</sup> As to whether or not he must do so as a condition precedent to disaffirmance, or whether the other party must be left to his action to recover the consideration after disaffirmance, and as to whether the consideration must be returned where it has been wasted or otherwise disposed of, the decisions are conflicting. It is therefore impossible to lay down any gen-

<sup>157</sup> After disaffirming, however, he no longer has any right to property which he has received under the contract, and, as we shall see, it may be recovered from him if he has it.

<sup>158</sup> *Badger v. Phinney*, 15 Mass. 359; *Bigelow v. Kinney*, 8 Vt. 353; *Wilhelm v. Hardman*, 13 Md. 140; *Mustard v. Wohlford*, 15 Grat. (Va.) 329; *Combs v. Hawes* (Cal.) 8 Pac. Rep. 597 (statutory); *Kitchen v. Lee*, 11 Paige (N. Y.) 107; *Bartlett v. Cowles*, 15 Gray (Mass.) 446.

eral rule. All that we can do is to state the different positions taken by the courts, and leave it for the reader to examine the cases, and satisfy himself as to the law in his own particular state.

The law, as gathered from the cases, may be stated as follows:

(a) As we have already seen, if a person who, during his minority, has received the consideration for his contract, has the consideration in kind when he attains his majority, and afterwards disposes of it, either by consuming it himself or by selling it or otherwise putting it beyond his control, or if he retains and uses it for an unreasonable time without seeking to avoid the contract, he thereby ratifies the contract; and this applies whether the contract is executory or executed on his part.<sup>159</sup> Of course, if through no fault on his part, nor conduct amounting to a ratification, consideration which is possessed in kind on attaining majority subsequently becomes incapable of return, he will occupy the same position as if this state of things existed when he attained his majority.

(b) Where the contract is executory on the part of the infant, and he has not ratified it by his conduct, as explained above, it cannot, according to the weight of authority, be enforced against him, even though he retains the consideration received by him in kind. He need not return the consideration as a condition precedent to repudiating the contract and pleading his infancy in an action brought against him to enforce it.<sup>160</sup> When he repudiates his contract, however, he no longer has any right to the consideration he has received, and, at least, if he has it, the other party may maintain an action to recover it.<sup>161</sup> According to the weight of authority, if he has disposed of the consideration so that he cannot return it in kind, he cannot be held liable for it. The adult is remediless.<sup>162</sup> It must be remembered that retaining the consideration may amount to a ratification.

(c) Where the contract is executed on the part of the infant, and he has the consideration received by him in kind, it is the almost

<sup>159</sup> Ante, p. 250.

<sup>160</sup> Craighead v. Wells, 21 Mo. 409; Price v. Furman, 27 Vt. 268.

<sup>161</sup> Badger v. Phinney, 15 Mass. 359; Mustard v. Wohlford, 15 Grat. (Va.) 329.

<sup>162</sup> See Brawner v. Franklin, 4 Gill (Md.) 470; Boody v. McKenney, 23 Me. 517, 525. And see post, p. 262.

universal rule that he cannot repudiate the contract, and recover what he has parted with, or for what he has done, unless he returns, or offers to return, the consideration.<sup>163</sup> Some cases go to the extent of saying without qualification that the return of the consideration in such a case is not a condition precedent to the right to disaffirm. This is so where the disaffirmance by the infant is by dealing with the property he has parted with as his own, and where he is not seeking the aid of a court to recover it; as where, having sold land and received the purchase money, he disaffirms by conveying the land to another. The latter deed is effectual though he has not returned the consideration for his prior deed.<sup>164</sup> But an infant cannot maintain an action to recover what he has parted with, or for what he has done, without returning the consideration, if he has it.

(d) According to the weight of authority, an infant, on attaining his majority, may disaffirm his contract, whether it is executory or executed, and in the latter case may recover back what he has parted with, or for what he has done, without returning or offering to return the consideration received by him, if, during his minority, he has squandered or otherwise disposed of it so that he cannot return it.<sup>165</sup> He is not bound to return an equivalent. Some of the

<sup>163</sup> *Price v. Furman*, 27 Vt. 268; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. Rep. 476; *Dickerson v. Gordon* (Sup.) 5 N. Y. Supp. 310; *Harvey v. Briggs*, 68 Miss. 60, 8 South. Rep. 274; *Chandler v. Simmons*, 97 Mass. 508; *Carr v. Clough*, 26 N. H. 280; *Robinson v. Weeks*, 56 Me. 102.

<sup>164</sup> *Chandler v. Simmons*, 97 Mass. 508; *Tucker v. Moreland*, 10 Pet. 57, 73; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. Rep. 402; *Shaw v. Boyd*, 5 Serg. & R. (Pa.) 309; *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 South. Rep. 417.

<sup>165</sup> *Gibson v. Soper*, 6 Gray (Mass.) 282; *Chandler v. Simmons*, 97 Mass. 508; *Price v. Furman*, 27 Vt. 268; *Boody v. McKenney*, 23 Me. 517; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. Rep. 476; *Reynolds v. McCurry*, 100 Ill. 356; *Mustard v. Wohlford*, 15 Grat. (Va.) 329; *Walsh v. Young*, 110 Mass. 399; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. Rep. 402; *Miller v. Smith*, 26 Minn. 248, 2 N. W. Rep. 182; *Green v. Green*, 69 N. Y. 553; *Mordecai v. Pearl* (Sup.) 18 N. Y. Supp. 543; *Petrie v. Williams* (Sup.) 23 N. Y. Supp. 237; *Brawner v. Franklin*, 4 Gill (Md.) 463; *Brandon v. Brown*, 106 Ill. 519; *Craig v. Van Bubber*, 100 Mo. 584, 13 S. W. Rep. 966; *Lucy v. P. Kler* (Mo. Sup.) 25 S. W. Rep. 206; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. Rep. 12; *Harvey v. Briggs*, 68 Miss. 60, 8 South. Rep. 274; *Englebert v. Troxell* (Neb.) 58 N. W. Rep. 852; *Manning v. Johnson*, 26 Ala. 446.

courts extend this rule to cases in which the infant was even benefited by disposing of the consideration.<sup>166</sup> The principle on which this rule is based is that the privilege of the infant to avoid his contracts is intended to protect him against the improvidence which is incident to his immaturity, and that to require him to return the consideration received and squandered or otherwise disposed of during his minority would be to withdraw this protection, and frustrate the object of the law. This rule has been applied, not only where the contract was a sale and conveyance of land by the infant, but to sales of personalty and other contracts as well.

(e) Many courts, on the other hand, applying the principle that the privilege of an infant is intended as a shield, and not as a sword,—or, in other words, as a protection to the infant, and not as an instrument of fraud and injustice to others,—hold that an infant cannot avoid his executed contracts, whereby he has benefited, and recover what he has parted with, or for what he has done, unless he can and does restore the consideration he has received; and that it is immaterial that the consideration has been disposed of by him, or for any other reason cannot be returned. In other words, they hold that an infant who receives a substantial consideration for his executed contract cannot, on attaining his majority, avoid the contract, and recover what he has parted with, unless he can and does place the other party in statu quo.<sup>167</sup>

<sup>166</sup> It has been held in a late Massachusetts case that a minor who contracts with his employer that the price of articles, not necessities, purchased by him from his employer, shall be deducted from his wages, may, on becoming of age, repudiate his contract, and recover his wages without deduction; and this, even though he may have disposed of the articles to his benefit. *Morse v. Ely*, 154 Mass. 458, 28 N. E. Rep. 577. And see *Genereux v. Sibley* (R. I.) 25 Atl. Rep. 345. It has been held that, where an infant pays the premiums on life insurance, he may disaffirm the contract on becoming of age, return the policy, and recover what he has paid. *Johnson v. Northwestern Mut. Life Ins. Co.* (Minn.) 57 N. W. Rep. 934.

<sup>167</sup> *Holmes v. Blogg*, 8 Taunt. 508 (but see *Corpe v. Overton*, 10 Bing. 252); *Adams v. Beall*, 67 Md. 53, 8 Atl. Rep. 664; *Breed v. Judd*, 1 Gray (Mass.) 455; *Wilhelm v. Hardman*, 13 Md. 140; *Taft v. Pike*, 14 Vt. 405; *Heath v. Stevens*, 48 N. H. 251; *Womack v. Womack*, 8 Tex. 397, 417; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Locke v. Smith*, 41 N. H. 346.

**SAME—EFFECT OF RATIFICATION.**

**133. Ratification renders the contract absolutely binding ab initio.**

The effect of a ratification, whether it is in express words or implied from conduct, is to render the contract binding ab initio.<sup>168</sup> The new promise is not a new contract, but simply a ratification of the original contract; and a suit, if brought, must be on the original contract, and not on the new promise. The ratification renders the contract binding on both parties, and absolutely binding. It cannot afterwards be retracted, and the contract disaffirmed.<sup>169</sup>

**SAME—EFFECT OF DISAFFIRMANCE.**

**134. Disaffirmance renders the contract absolutely void ab initio, and the rights of the parties are determined as if there had never been a contract between them.**

**135. Third parties, therefore, acquire no rights under an avoided contract.**

**136. As we have seen, the infant may recover what he has parted with, or for what he has done, though generally he must return what he has received.<sup>170</sup>**

As we have already seen, if the voidable contract of an infant is executory, no rights are acquired until it is ratified; but, if executed by him, it vests the other party with an interest subject to be defeated by the infant's election to rescind on attaining his majority. A sale and conveyance of land, for instance, or a sale and delivery of chattels, vests the purchaser with a defeasible title, sub-

<sup>168</sup> *Ward v. Anderson*, 111 N. C. 115, 15 S. E. Rep. 933; *Palmer v. Miller*, 25 Barb. (N. Y.) 390; *Minock v. Shortridge*, 21 Mich. 316; *Hall v. Jones*, 21 Md. 439.

<sup>169</sup> *Hastings v. Dollarhide*, 24 Cal. 195. So, where a contract has been in part affirmed by a new arrangement and promise, the affirmance is not avoided by the fact that because of a subsequent disagreement the arrangement is not carried out. *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. Rep. 541.

<sup>170</sup> *Ante*, p. 254.

ject to be defeated or confirmed by the infant when he becomes of age, or, in the case of personal property, to be defeated by disaffirmance before he becomes of age.<sup>171</sup> The purchaser may therefore deal with the property until rescission by sale or otherwise, and it becomes important to know what effect a rescission will have.

It is well settled that disaffirmance of a contract relates back to the date of the contract, and renders it void on both sides *ab initio*;<sup>172</sup> and it follows that the rights of the parties must be determined just as if there never had been any contract between them. One, therefore, who has occupied land under a deed by an infant which is avoided by him on becoming of age is liable for rents during the time of his occupation, just as if there had been no deed.<sup>173</sup> If the infant's vendee has sold the property to a third person, the latter occupies no better position than the vendee, and the property may be recovered from him even though he was a purchaser for value, and without notice of the defeasible nature of the title.<sup>174</sup>

Where services have been rendered by an infant under a voidable contract, and he has received nothing under it, he may, on disaffirming the contract, recover the value of the services as upon an implied contract.<sup>175</sup> In such a case he may, according to the bet-

<sup>171</sup> Ante, p. 244.

<sup>172</sup> *Rice v. Boyer*, 108 Ind. 472, 9 N. E. Rep. 420; *Mustard v. Wohlford*, 15 Grat. (Va.) 329; *French v. McAndrew*, 61 Miss. 187; *Boyden v. Boyden*, 9 Metc. (Mass.) 519; *Hoyt v. Wilkinson*, 57 Vt. 404; *Metts v. Feltgen* (Ill. Sup.) 27 N. E. Rep. 911, 36 N. E. Rep. 81; *Derocher v. Continental Mills*, 58 Me. 217; *Vent v. Osgood*, 19 Pick. (Mass.) 572.

<sup>173</sup> *French v. McAndrew*, 61 Miss. 187.

<sup>174</sup> *Hill v. Anderson*, 5 Smedes & M. (Miss.) 216; *Mustard v. Wohlford*, 15 Grat. (Va.) 329; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372; *Downing v. Stone*, 47 Mo. App. 144; *Miles v. Lingerian*, 24 Ind. 385.

<sup>175</sup> *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Gaffney v. Hayden*, 110 Mass. 137; *Price v. Furman*, 27 Vt. 268; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 373; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Ray v. Haines*, 52 Ill. 485; *Judkins v. Walker*, 17 Me. 38; *Derocher v. Continental Mills*, 58 Me. 217; *Radley v. Kenedy* (City Ct. Brook.) 14 N. Y. Supp. 268; *Vehue v. Pinkham*, 60 Me. 142; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Lowe v. Sinklear*, 27 Mo. 306; *Dallas v. Hollingsworth*, 3 Ind. 537; *Thomas v. Dike*, 11 Vt. 273; *Lufkin v. Mayall*, 25 N. H. 82. But he can recover no more than he is equitably entitled to under all the circumstances. *Hagerty v. Nashua Lock Co.*, 62 N. H. 576.

ter opinion, recover without any deduction for damages caused by his breach of the contract, for to allow such a deduction would be, in effect, to enforce the contract.<sup>176</sup> So, also, if an infant has paid money or parted with other property under a voidable contract, and has himself received nothing, he may recover what he has parted with on avoiding the contract.<sup>177</sup> As to whether an infant who has received something under his contract can avoid it and recover what he has parted with, or for what he has done, the authorities are conflicting. We have already discussed this question, and shown the different positions which the courts have taken.<sup>178</sup>

A disaffirmance cannot be retracted. Ratification of a contract after it has once been disaffirmed comes too late.<sup>179</sup>

#### **SAME—TORTS IN CONNECTION WITH CONTRACTS.**

137. Though an infant is liable for his torts, a breach of contract cannot be treated as a tort, so as to make him liable. The tort must be separate and independent of it.

138. At common law though it is otherwise in equity, an infant's false representations as to his age will not estop him from avoiding his contract; they may, however, render him liable in an action for deceit.

139. When an infant avoids his contract, and retains the consideration in kind, such retention, according to the weight of authority, is a tort, and he is liable in an action for conversion.

<sup>176</sup> *Derocher v. Continental Mills*, 58 Me. 217; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Radley v. Kenedy* (City Ct. Brook.) 14 N. Y. Supp. 268. But see *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Thomas v. Dike*, 11 Vt. 273. The defendant, in such a case, may, of course, set off any legal claim against the infant; as, for instance, a claim for necessities furnished him. *Meredith v. Crawford*, 34 Ind. 399.

<sup>177</sup> *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Corpe v. Overton*, 10 Bing. 252; *Millard v. Hewlett*, 19 Wend. (N. Y.) 301. And see cases cited in note 165, *supra*.

<sup>178</sup> Ante, pp. 254-257.

<sup>179</sup> *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 South. Rep. 417.

Though an infant is liable for his torts, it is well settled that a breach of contract cannot be treated as a tort, so as to make him liable. The wrong, according to the weight of authority, must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it.<sup>180</sup> Where, for instance, an infant hired a horse to ride, and injured it by overriding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence.<sup>181</sup> Where, on the other hand, an infant hired a horse expressly for riding, and not for jumping, and then lent it to a friend, who killed it in jumping, he was held liable, because what he had done was not an abuse of the contract, but an act which he was expressly forbidden to do, and was, therefore, independent of the contract.<sup>182</sup>

The fraud of an infant in falsely representing himself to be of age, and so inducing another to contract with him, does not estop him from pleading his infancy if sued upon his contract.<sup>183</sup> He

<sup>180</sup> *Jennings v. Rundall*, 8 Term R. 335, Ewell, Lead. Cas. 185; *Gilson v. Spear*, 38 Vt. 311; *Eaton v. Hill*, 50 N. H. 235; *Freeman v. Roland*, 14 R. I. 29; *West v. Moore*, 14 Vt. 447; *Campbell v. Perkins*, 8 N. Y., at page 440; *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; *Mathews v. Cowan*, 59 Ill. 341; *Penrose v. Curren*, 3 Rawle (Pa.) 351. But see *Ward v. Vance*, 1 Nott & McC. (S. C.) 197; *Peigne v. Sutcliffe*, 4 McCord (S. C.) 387; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. Rep. 420; *Fitts v. Hall*, 9 N. H. 441. An infant cannot be held liable for false warranty on an exchange of horses, since it is "a case in which the assumpsit is clearly the foundation of the action; for it is in fact undertaking that the horse was sound." *Green v. Greenbank*, 2 Marsh. 485. A promise by an infant to marry is not binding on him, but he may nevertheless be held liable for his tort in seducing a woman under promise of marriage. *Becker v. Mason*, 93 Mich. 336, 53 N. W. Rep. 361.

<sup>181</sup> *Jennings v. Rundall*, 8 Term R. 335. He may, however, sue in trespass, though he cannot bring an action on the case, as the latter, but not the former, would be based on lawful possession in defendant under the contract. *Campbell v. Stakes*, 2 Wend. (N. Y.) 137.

<sup>182</sup> *Burnard v. Haggis*, 15 O. B. (N. S.) 45; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Ray v. Tubbs*, 50 Vt. 688. But see *Penrose v. Curren*, 3 Rawle (Pa.) 351.

<sup>183</sup> *Studwell v. Shapter*, 54 N. Y. 249; *Burdett v. Williams*, 30 Fed. Rep. 697; *Wieland v. Kobick*, 110 Ill. 16; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Brown v. McCune*, 5



may, however, according to the weight of authority, be held liable in an action for deceit.<sup>184</sup> In equity, where the infant has falsely represented that he was of age, or taken active steps to conceal his age, or been otherwise guilty of fraud, and has thereby induced the other party to enter into the contract, his fraud will estop him from pleading his infancy to the other's prejudice.<sup>185</sup> Mere failure to disclose his age, however, is not such fraud as will warrant equitable interference with the common-law rule.<sup>186</sup> Where an infant obtains goods by false and fraudulent representations as to his age, the better opinion is that the other party may rescind and recover them back.<sup>187</sup>

We have already to some extent noticed the remedies of the adult party where an infant repudiates his contract after having received the consideration. We have seen that, where the infant has the consideration in kind when he repudiates his executed contract, most courts will require him to return it before they will allow him to recover what he has parted with, or for what he has done. We have also seen that executory contracts of an infant may be disaffirmed by him without returning the consideration he has received, even though he may have it in kind. In such a case, however, he no longer has a right to hold the consideration; and, if

*Sandf. (N. Y.)* 228; *Burley v. Russell*, 10 N. H. 184; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. Rep. 695; *Sims v. Everhardt*, 102 U. S. 300; *Norris v. Vance*, 3 Rich. (S. C.) 164; *Whitcomb v. Joslyn*, 51 Vt. 79; *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. Rep. 312. But see *Bradshaw v. Van Winkle*, 133 Ind. 134, 32 N. E. Rep. 877; *Lacy v. Pixler (Mo.)* 25 S. W. Rep. 206. Contra, under Kansas statute. *Dillon v. Burnham*, 43 Kan. 77, 22 Pac. Rep. 1016.

<sup>184</sup> *Fitts v. Hall*, 9 N. H. 441; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. Rep. 420; *Wallace v. Morss*, 5 Hill (N. Y.) 391; *Burley v. Russell*, 10 N. H. 184; *Manning v. Johnson*, 26 Ala. 446; *Eckstein v. Frank*, 1 Daly (N. Y.) 334. Contra, *Nash v. Jewett*, 61 Vt. 501, 18 Atl. Rep. 47; *Johnson v. Pie*, 1 Sid. 258.

<sup>185</sup> *Ferguson v. Bobo*, 54 Miss. 121. See *Evans v. Morgan*, 69 Miss. 328, 12 South. Rep. 270; *Charles v. Hastedt (N. J. Eq.)* 26 Atl. Rep. 564; *Thormaehlen v. Kaeppel (Wis.)* 56 N. W. Rep. 1089.

<sup>186</sup> *Baker v. Stone*, 136 Mass. 405; *Sewell v. Sewell*, 92 Ky. 500, 18 S. W. Rep. 162; *Davidson v. Young*, 38 Ill. 145; *Bantley v. Wolf*, 60 Miss. 420; *Price v. Jennings*, 62 Ind. 111.

<sup>187</sup> *Badger v. Phinney*, 15 Mass. 359; *Neff v. Landis*, 110 Pa. St. 204, 1 Atl. Rep. 177.

he fails to return it, he is, according to the better opinion, guilty of a tort, for which the other party may maintain an action.<sup>188</sup>

If the infant, while rightfully in possession of the consideration which he has received, has wasted or disposed of it during his minority, and he is allowed to disaffirm his contract, the other party is remediless,<sup>189</sup> unless he can trace the property into the hands of those who obtained it from the infant.

#### INSANE PERSONS—IN GENERAL.

**140.** As a rule, a contract entered into by an insane person, or person non compos mentis, is voidable at his option; but the rule is subject to exceptions, as follows:

**EXCEPTIONS—**(a) The following contracts are valid and binding:

- (1) Contracts created by law. \*
- (2) Contracts for necessities furnished to himself, or to his wife or children.
- (3) In most, but not all, jurisdictions, where the sane party acted fairly and in good faith, without actual or constructive knowledge of the other's insanity, and the contract has been so far executed that he cannot be placed in statu quo.

(b) The following contracts are void:

- (1) In most, but not all, jurisdictions, contracts by a person who has been judicially declared insane on inquisition, and placed under guardianship.
- (2) In a few jurisdictions, deeds and powers of attorney or other appointments of an agent.

**141.** A person is non compos mentis when he enters into a contract if, by reason of idiocy, lunacy, monomania, or

<sup>188</sup> *Badger v. Phinney*, 15 Mass. 359; *Mustard v. Wohlford*, 15 Grat. (Va.) 829; *Yasse v. Smith*, 6 Oranch, 226; *Manning v. Johnson*, 28 Ala. 443.

<sup>189</sup> *Ante*, p. 256, note 165.

other defect or disease of the mind, he is at that particular time incapable of understanding the nature and effect of that particular contract.

Formerly it was thought that a man could not avoid a contract entered into while he was non compos mentis. It was said to be a maxim of the common law that no man of full age should be allowed by plea to stultify himself, and thereby avoid his own deed or contract.<sup>190</sup> It seems, however, that this never was the common law, and that the cases so holding were erroneous.<sup>191</sup> At any rate, the doctrine has long since been exploded, and it is universally held in England and with us that a contract made by a person who, to the knowledge of the other party at least, is so lacking in mental capacity from idiocy, lunacy, senile dementia, or other defect or disease of the mind, that he is incapable of understanding what he is doing, is voidable.<sup>192</sup> The fundamental idea of a contract is that it requires the assent of two minds, but a lunatic, or a person otherwise non compos mentis, has no mind, and is therefore incapable of assenting.

The incapacity may result from lunacy,<sup>193</sup> from idiocy,<sup>194</sup> from senile dementia,<sup>195</sup> or any other defect or disease of the mind, what-

<sup>190</sup> *Beverley's Case*, 4 Coke, 123; Co. Litt. 147; 2 Bl. Comm. 292.

<sup>191</sup> Fitzh. Nat. Brev. 202; *Yates v. Boen*, 2 Strange, 1104; *Webster v. Woodford*, 3 Day (Conn.) 90; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431.

<sup>192</sup> *Webster v. Woodford*, 3 Day (Conn.) 90; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431; *Rice v. Peet*, 15 Johns. (N. Y.) 503; *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Morris v. Clay*, 8 Jones (N. C.) 216; *Lang v. Whidden*, 2 N. H. 435; *Burke v. Allen*, 29 N. H. 106; *Thornton v. Appleton*, 20 Me. 298; *Bensell v. Chancellor*, 5 Whart. (Pa.) 371; *Burnham v. Mitchell*, 34 Wis. 117; *Tolson v. Garner*, 15 Mo. 494; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658; *Dexter v. Hall*, 15 Wall. 9, 20; *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. Rep. 854; *Van Deusen v. Sweet*, 51 N. Y. 378.

<sup>193</sup> *Merritt v. Gumaer*, 2 Cow. (N. Y.) 552.

<sup>194</sup> *Burnham v. Kidwell*, 113 Ill. 425; *Ball v. Mannin*, 3 Bligh (N. S.) 1, *Ewell*, Lead. Cns. 534.

<sup>195</sup> As to weakness of intellect or imbecility from old age, see *Stone v. Wilbern*, 83 Ill. 105; *Jeneson v. Jeneson*, 66 Ill. 259; *Guild v. Hull*, 127 Ill. 523, 20 N. E. Rep. 665; *Peabody v. Kendall*, 145 Ill. 519, 32 N. E. Rep. 674; *Argo v. Coffin*, 142 Ill. 368, 32 N. E. Rep. 679; *Lynch v. Doran*, 95 Mich. 395, 54 N. W. Rep. 882; *Arnold v. Whitcomb*, 83 Mich. 19, 46 N. W. Rep.

ever may be its cause.<sup>196</sup> To render a person thus incapable of contracting, his infirmity need not be so great as to dethrone his reason, nor amount to entire want of reason;<sup>197</sup> but, on the other hand, it must be something more than mere weakness of intellect.<sup>198</sup> It must be such as to render the person incapable of knowing what he is about, or, to be more accurate, of comprehending the subject of the contract, and its nature and probable consequences.<sup>199</sup> A

1029; *Stewart v. Flint*, 59 Vt. 144, 8 Atl. Rep. 801; *King v. Cummings*, 60 Vt. 502, 11 Atl. Rep. 727; *Keeble v. Cummins*, 5 Hayw. (Tenn.) 43; *Coleman v. Frazer*, 3 Bush (Ky.) 300; *Bressey's Adm'r v. Gross* (Ky.) 17 S. W. Rep. 150; *Clark v. Kirkpatrick* (N. J. Ch.) 16 Atl. Rep. 309; *Trimbo v. Trimbo*, 47 Minn. 389, 50 N. W. Rep. 350; *Cole v. Cole*, 21 Neb. 84, 31 N. W. Rep. 493; *Crowe v. Peters*, 63 Mo. 429; *Shaw v. Ball*, 55 Iowa, 55, 7 N. W. Rep. 413; *Marshall v. Marshall*, 75 Iowa, 132, 39 N. W. Rep. 230; *Cocke v. Montgomery*, 75 Iowa, 259, 39 N. W. Rep. 386. Old age is not of itself evidence of incapacity to make a binding contract. *Buckey v. Buckey* (W. Va.) 18 S. E. Rep. 383. And see cases cited above.

<sup>196</sup> See *Henderson v. McGregor*, 30 Wis. 78; *Brothers v. Bank*, 84 Wis. 381, 54 N. W. Rep. 786; *Somes v. Skinner*, 16 Mass. 348; *Hale v. Brown*, 11 Ala. 87; *Conant v. Jackson*, 16 Vt. 335; *Wilson v. Oldham*, 12 B. Mon. (Ky.) 55; *Johnson v. Chadwell*, 8 Humph. (Tenn.) 145. The cause of the mental infirmity being immaterial, a person non compos mentis may avoid his contracts, though his insanity is the result of habitual drunkenness. *Bliss v. Connecticut R. Co.*, 24 Vt. 424; *Menkins v. Lightner*, 18 Ill. 282. Indeed, as we shall presently see, a contract may be avoided because of drunkenness.

<sup>197</sup> *Ball v. Mannin*, 3 Bligh (N. S.) 1; *Ewell*, Lead. Cas. 534.

<sup>198</sup> *Dennett v. Dennett*, 44 N. H. 531; *Stone v. Wilbern*, 83 Ill. 105; *Lawrence v. Willis*, 75 N. C. 471; *Simonton v. Bacon*, 49 Miss. 582; *Des Moines Nat. Bank v. Chisholm*, 71 Iowa, 675, 33 N. W. Rep. 234; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *West v. Russell*, 48 Mich. 74, 11 N. W. Rep. 812; *Cocke v. Montgomery*, 75 Iowa, 259, 39 N. W. Rep. 386; *Guild v. Hull*, 127 Ill. 523, 20 N. E. Rep. 665; *Davis v. Phillips*, 85 Mich. 198, 48 N. W. Rep. 513; *White v. Farley*, 81 Ala. 563, 8 South. Rep. 215; *Maddox v. Simmons*, 31 Ga. 528; *Willemin v. Dunn*, 93 Ill. 511; *Kimball v. Cuddy*, 117 Ill. 213, 7 N. E. Rep. 580; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. Rep. 276; *Miller v. Craig*, 36 Ill. 110; *Cain v. Warford*, 33 Md. 23; *Cadwallader v. West*, 48 Mo. 483. The fact that a person is deaf and dumb does not alone render him incapable of contracting. See *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Brown v. Brown*, 3 Conn. 299; *Barnett v. Barnett*, 1 Jones, Eq. (N. C.) 221.

<sup>199</sup> *Bishop*, Cont. § 962; *Dennett v. Dennett*, 44 N. H. 531; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. Rep. 636; *Bond v. Bond*, 7 Allen (Mass.) 1; *Young v. Stevens*, 48 N. H. 135; *Musselman v. Cravens*, 47 Ind. 1; *Lilly v. Waggoner*, 27 Ill. 396; *Baldwin v. Dunton*, 40 Ill. 188; *Titcomb v. Vantyle*, 84 Ill. 371;

person need not be permanently insane to be incapable of making a binding contract. It is enough if he is insane at the time he enters into the contract.<sup>200</sup> On the other hand, the contract must have been made while insane, for, if made during a lucid interval, it is binding.<sup>201</sup>

Nor need the insanity be general. A person who is laboring under an insane delusion is incapable of making a binding contract if his delusion is so connected with the subject-matter of the particular contract as to render him incapable of comprehending its nature and probable consequences. If such was his condition, he may avoid the contract, though he may have been perfectly sane in respect of other matters, and might have been able to make a binding contract in reference to some other subject-matter.<sup>202</sup> The monomania must have been so connected with the subject of the contract in order to avoid it.<sup>203</sup>

*Worthington v. Worthington* (Md.) 20 Atl. Rep. 911; *Brown v. Brown*, 108 Mass. 386; *Crowther v. Rowlandson*, 27 Cal. 381; *Somers v. Pumphrey*, 24 Ind. 231; *Burnham v. Mitchell*, 34 Wis. 136; *Henderson v. McGregor*, 30 Wis. 78; *Hovey v. Chase*, 52 Me. 304; *Hovey v. Hobson*, 55 Me. 256; *Alman v. Stout*, 42 Pa. St. 114; *Noel v. Karper*, 53 Pa. St. 97; *Dicken v. Johnson*, 7 Ga. 484; *Lozeau v. Shields*, 23 N. J. Eq. 509; *Tolson v. Garner*, 15 Mo. 494.

<sup>200</sup> *Curtis v. Brownell*, 42 Mich. 165, 3 N. W. 936; *Peaslee v. Robbins*, 3 Metc. (Mass.) 164; *Jenners v. Howard*, 6 Blackf. (Ind.) 240.

<sup>201</sup> *Hall v. Warren*, 9 Ves. 605; *Lilly v. Waggoner*, 27 Ill. 395; *McCormick v. Littler*, 85 Ill. 62; *Smith v. Smith*, 108 N. O. 365, 12 S. E. Rep. 1045, and 13 S. E. Rep. 113; *Jones v. Perkins*, 5 B. Mon. (Ky.) 222; *Norman v. Georgia Loan & Trust Co.* (Ga.) 18 S. E. Rep. 27; *Beckwith v. Butler*, 1 Wash. (Va.) 224; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Staples v. Wellington*, 58 Me. 453; *Stewart v. Reddit*, 3 Md. 81. The authorities are conflicting as to whether the burden is on the other party to show that the contract was made in a lucid interval. That it is, see *Fishburne v. Ferguson's Heirs*, 84 Va. 87, 4 S. E. Rep. 575; *Sheets v. Bray*, 125 Ind. 33, 24 N. E. Rep. 357; *Hall v. Warren*, 9 Ves. 605. Contra, *Wright v. Wright*, 139 Mass. 177, 29 N. E. Rep. 380.

<sup>202</sup> *Bond v. Bond*, 7 Allen (Mass.) 1; *Riggs v. American Tract Soc.*, 95 N. Y. 503; *Dennett v. Dennett*, 44 N. H. 531; *Searle v. Galbraith*, 73 Ill. 269; *Alston v. Boyd*, 6 Humph. (Tenn.) 504; *Samuel v. Marshall*, 3 Leigh (Va.) 567; *Boyce v. Smith*, 9 Grat. (Va.) 704. Monomania on the subject of religion or spiritualism. *Boyce v. Smith*, 9 Grat. (Va.) 704; *Lewis v. Arbuckle*, 85 Iowa, 335, 52 N. W. Rep. 237; *West v. Russell*, 48 Mich. 74, 11 N. W. Rep. 812; *Burgess v. Pollock*, 53 Iowa, 273, 5 N. W. Rep. 179.

<sup>203</sup> *Boyce v. Smith*, 9 Grat. (Va.) 704.

*Effect of Contracts.*

Thus far we have spoken of the contracts of a person non compos mentis as being voidable only, and as a rule they are so; but, as in the case of infants, some of his contracts are valid, and some of them are held to be absolutely void. In some jurisdictions the contract is held binding where the other party acted in good faith, and without knowledge of the insanity. Of this we will presently speak at some length.

*Same—Contracts Created by Law.*

As in the case of infancy, the rule that a person may avoid a contract made while he was insane does not apply to contracts created by law, for in these contracts the consent of the party is not necessary.<sup>204</sup>

*Same—Contracts for Necessaries.*

Nor does the rule apply to the contracts of a person non compos mentis for necessaries furnished to himself or to his wife and children.<sup>205</sup> The rules on this subject are substantially the same as in the case of an infant's contracts for necessaries; except, it seems, that, unlike an infant, a person non compos mentis is liable for labor and materials furnished for the preservation of his estate, where they were necessary for its preservation.<sup>206</sup> In all cases the credit must have been given to the insane person, and not to some third person, or the law will not imply a contract on his part.<sup>207</sup> The fact that the person has been judicially declared insane, and placed under guardianship, does not prevent his liability for necessaries.<sup>208</sup>

<sup>204</sup> *Reando v. Misplay*, 90 Mo. 251, 2 S. W. Rep. 405.

<sup>205</sup> *La Rue v. Gilkyson*, 4 Pa. St. 375; *Richardson v. Strong*, 13 Ind. (N. C.) 106; *McCormick v. Littler*, 85 Ill. 62; *Baxter v. Portsmouth*, 5 Barn. & C. 170; *Van Horn v. Hann*, 39 N. J. Law, 207; *Read v. Legard*, 6 Exch. 636; *Searies v. Pipkin*, 60 N. C. 513; *Shaw v. Thompson*, 16 Pick. (Mass.) 198; *Sawyer v. Lufkin*, 56 Me. 308; *Reando v. Misplay*, 90 Mo. 251, 2 S. W. Rep. 405; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658; *Kendall v. May*, 10 Allen (Mass.) 50; *Rhodes v. Rhodes*, 44 Ch. Div. 94; *Sceva v. True*, 53 N. H. 627. Liability for necessaries furnished his wife. *Read v. Legard*, supra. He has even been held liable for luxuries furnished in good faith. *Kendall v. May*, supra; post, pp. 715, 778.

<sup>206</sup> *Williams v. Wentworth*, 5 Beav. 325.

<sup>207</sup> *Blah. Cont.* § 968; *Massachusetts Hospital v. Fairbanks*, 129 Mass. 78; 132 Mass. 414.

<sup>208</sup> *McCrillis v. Bartlett*, 8 N. H. 560; *Sawyer v. Lufkin*, 56 Me. 308; *Reando*

*Same—Void and Voidable.*

It has been held by some courts that the deed of an insane person,<sup>209</sup> or a power of attorney or other appointment of an agent,<sup>210</sup> is absolutely void. In most jurisdictions, however, no distinction is made in this respect between the deed of an insane person and that of an infant. It is held to be voidable, and not void.<sup>211</sup> As a general, and almost universal, rule, all his contracts other than valid ones are not void, but simply voidable at his option;<sup>212</sup> and they are binding on the other party if he elects to hold him.<sup>213</sup>

*Inquisition and Adjudication of Lunacy.*

In most jurisdictions it is held—in some, however, by reason of express statutory provisions—that if a person has been judicially determined to be insane, and placed under guardianship, the decree and letters of guardianship take from him all capacity to contract, and that his contracts while under guardianship are absolutely

*v. Misplay*, 90 Mo. 251, 2 S. W. Rep. 405; *Baxter v. Portsmouth*, 5 Barn. & C. 170; *Fruitt v. Anderson*, 12 Ill. App. 421.

<sup>209</sup> *Van Deusen v. Sweet*, 51 N. Y. 378 (but see *Ingraham v. Baldwin*, 9 N. Y. 45); *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. Rep. 512; *In re Estate of Desilver*, 5 Rawle (Pa.) 111; *Farley v. Parker*, 6 Or. 105; *Goodyear v. Adams* (Sup.) 5 N. Y. Supp. 275; *Brown v. Miles* (Sup.) 16 N. Y. Supp. 251; *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. Rep. 175; *Thompson v. Leach*, 3 Salk. 300.

<sup>210</sup> *Dexter v. Hall*, 15 Wall. 9. And see *Marvin v. Ingllis*, 39 How. Pr. (N. Y.) 329.

<sup>211</sup> *Hovey v. Hobson*, 53 Me. 451; *Walt v. Maxwell*, 5 Pick. (Mass.) 217; *Key v. Davis*, 1 Md. 32; *Gibson v. Soper*, 6 Gray (Mass.) 279; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434; *Allis v. Billings*, 6 Metc. (Mass.) 415; *Evans v. Horan*, 52 Md. 602; *Burnham v. Kidwell*, 113 Ill. 425; *Eaton v. Eaton*, 37 N. J. Law, 108; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. Rep. 249; *Somers v. Pumphrey*, 24 Ind. 234; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 245; *Allen v. Berryhill*, 27 Iowa, 534.

<sup>212</sup> *Allis v. Billings*, 6 Metc. (Mass.) 415; *Eaton v. Eaton*, 37 N. J. Law, 108; *Allen v. Berryhill*, 27 Iowa, 534; *Carrier v. Sears*, 4 Allen (Mass.) 326; *Key v. Davis*, 1 Md. 42; *Chew v. Bank of Baltimore*, 14 Md. 318; *Burke v. Allen*, 29 N. H. 106; *Burnham v. Kidwell*, 113 Ill. 425; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434; *Hovey v. Hobson*, 53 Me. 451; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. Rep. 249; *Riley v. Carter*, 76 Md. 581, 25 Atl. Rep. 667.

<sup>213</sup> *Harmon v. Harmon*, 51 Fed. Rep. 113; *Allen v. Berryhill*, 27 Iowa, 534.

void.<sup>214</sup> In other jurisdictions the fact that he has been adjudged insane, and placed under guardianship, only raises a presumption of incapacity to contract, which may be rebutted; but the presumption is very strong, and the proof of capacity must be clear.<sup>215</sup> As we have seen, the fact that an insane person is under guardianship does not affect his liability for necessities.<sup>216</sup>

*Ignorance and Good Faith of the Other Party.*

As to whether a contract made by an insane person can be avoided by him where the other party acted in good faith, and was ignorant of his infirmity, the authorities are in direct conflict. Probably in most, if not all, jurisdictions, a contract which is wholly executory will not, under any circumstances, be enforced against him.

Where the contract is executed in whole or in part, some of the courts hold that it may nevertheless be avoided by him, though it is fair and reasonable, and though it was entered into by the other party in perfect good faith, and in ignorance of his infirmity, and though the parties cannot be placed in statu quo.<sup>217</sup> In Massachusetts, for instance, it was held that, in trover for a note pledged to

<sup>214</sup> *Wait v. Maxwell*, 5 Pick. (Mass.) 217; *Leonard v. Leonard*, 14 Pick. (Mass.) 290; *Runnels v. Gerner*, 80 Mo. 474; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235; *Bradbury v. Place* (Me.) 10 Atl. Rep. 461; *Mohr v. Tulip*, 40 Wis. 66; *Knox v. Haug*, 48 Minn. 58, 50 N. W. Rep. 934; *Griswold v. Butler*, 3 Conn. 227. Not only must there have been an adjudication of lunacy, but the lunatic must be actually under guardianship. If, for instance, the guardian is discharged as being an unsuitable person, and no other guardian is appointed, the decree adjudging the ward insane is not conclusive as to his incapacity after the guardian's discharge. *Willworth v. Leonard*, 156 Mass. 277, 31 N. E. Rep. 299. The rule, it has been held, does not apply to statutory proceedings merely to determine whether a person is insane and in need of care and treatment for the purpose of committing him to a hospital for the insane. *Knox v. Haug*, *supra*.

<sup>215</sup> As to this, see *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. Rep. 997; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Parker v. Davis*, 8 Jones (N. C.) 460; *Hopson v. Boyd*, 6 B. Mon. (Ky.) 296; *Snook v. Watts*, 11 Beav. 105; *Gangwere's Estate*, 14 Pa. St. 417.

<sup>216</sup> *Ante*, p. 267.

<sup>217</sup> *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Anglo-California Bank v. Ames*, 27 Fed. Rep. 727; *Hovey v. Hobson*, 53 Me. 451; *Fitzgerald v. Reed*, 9 Smedes & M. (Miss.) 94; *Sullivan v. Flynn*, 20 D. C. 396; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. Rep. 512.



the defendant by the plaintiff while insane, it was no defense that the defendant, when he took the pledge, did not know the plaintiff was insane, and had no reason to suspect it, and did not overreach him, nor practice any fraud or unfairness. "The fairness of the defendant's conduct," it was said, "cannot supply the plaintiff's want of capacity."<sup>219</sup>

The weight of authority, however, both in this country and in England, is in favor of the doctrine that, where the contract has been executed in part, and the parties cannot be restored to their former positions, proof of the actual insanity of one of the parties at the time of making the contract, unaccompanied by any proof that the other knew of his condition, will not suffice to avoid the contract. In a leading English case a lunatic had purchased annuities of a society, paid the money, and died, whereupon his administratrix sued the society to recover back the money on the ground that the contract was void. The jury found that at the time of the contract the deceased was insane, but that there was nothing to indicate this to the defendant, and that the transaction was in good faith. It was held that the money could not be recovered. "The modern cases show," it was said, "that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored to their original position."<sup>220</sup> This case has been expressly followed and applied in a number of our courts, while others, though not citing it, have laid down the same doctrine.<sup>221</sup>

<sup>219</sup> *Seaver v. Phelps*, *supra*.

<sup>220</sup> *Molton v. Camroux*, 2 Exch. 489, 4 Exch. 17. And see *Imperial Loan Co. v. Stone* [1892] 1 Q. B. 599.

<sup>221</sup> *Eaton v. Eaton*, 37 N. J. Law, 108; *Lancaster Co. Bank v. Moore*, 78 Pa. St. 407; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Riley v. Albany Sav. Bank*, 36 Hun (N. Y.) 519; *Ingraham v. Baldwin*, 9 N. Y. 45; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. Rep. 249; *Lincoln v. Buckmaster*, 32 Vt. 652; *Young v. Stevens*, 48 N. H. 136; *Schaps v. Lehner* (Minn.) 55 N. W. Rep. 911; *Gribben v. Maxwell*, 34 Kan. 8; *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. Rep. 115; *Behrens v. McKenzie*, 23 Iowa, 333; *Shoulters v. Allen*, 51 Mich. 529, 16 N. W. Rep. 888; *Matthiessen R. Co. v. McMahon*, 38 N. J. Law, 536; *Burnham v. Kidwell*, 113 Ill. 425; *Scanlon v. Cobb*, 85 Ill. 296; *Pay v. Burditt*,

The doctrine thus stated, however, is not to be applied as a technical rule in all cases. "The cases will disclose," it has been said, "that one dealing with an insane person, and not knowing his condition, or any facts to put him on his guard, will be protected by the courts of law and equity against such person's repudiating his contract on the ground of his mental incapacity. But the rule is not a technical one, to be relied on at all times and under all circumstances. It is applied in each case only to prevent a wrong being done, and is based on the principle that 'the law will not permit the lunatic's infirmity to be made an instrument of fraud.'" <sup>222</sup>

#### SAME—RATIFICATION AND AVOIDANCE.

142. The voidable contract of a person non compos mentis may be ratified or avoided by himself when sane, or by his guardian during insanity, or by his representatives or heirs after his death.

143. By the weight of authority the right to disaffirm is personal, and neither the other party nor third persons can avoid it.

144. In a few jurisdictions the consideration received by the insane person need not be returned as a condition precedent to avoidance if he is unable to return it. <sup>223</sup>

145. The contract can be avoided as against bona fide purchasers.

81 Ind. 433; *Wilder v. Weakley*, 34 Ind. 181; *Northwestern Ins. Co. v. Blankenship*, 94 Ind. 535; *McCormick v. Littler*, 85 Ill. 62; *Lancaster County Bank v. Moore*, 78 Pa. St. 407; *Beals v. Lee*, 10 Pa. St. 56; *Carr v. Holliday*, 1 Dev. & B. Eq. (N. C.) 344; *Riggan v. Green*, 80 N. C. 236; *Myers v. Knabe*, 51 Kan. 720, 33 Pac. Rep. 602. If, however, the lunatic has received no benefit under the contract, it has been said that he can recover what he has parted with, notwithstanding the other party's good faith. *Lincoln v. Buckmaster*, 32 Vt. 658; *Van Patton v. Beals*, 46 Iowa, 63.

<sup>222</sup> *Knowlton's Anson*, Cont. 116, note.

<sup>223</sup> As we have seen, however, most courts hold that a contract entered into by the other party fairly and in good faith in ignorance of the other's insanity cannot be avoided if so far executed that the parties cannot be placed in statu quo. Ante, p. 270.

The voidable contracts of a person non compos mentis may be ratified or disaffirmed by him when he becomes sane, or during a lucid interval;<sup>224</sup> or, during the continuance of his infirmity, by his committee or guardian;<sup>225</sup> or, after his death, by his personal representative<sup>226</sup> or his heirs.<sup>227</sup> The privilege is personal to the insane person, or those who thus represent him; and neither the other party to the contract nor third persons can avoid it.<sup>228</sup> Ratification or disaffirmance need not be in express words, but may be by conduct, as in the case of ratification or disaffirmance by a person of a contract made during infancy.<sup>229</sup>

*Return of Consideration on Avoidance.*

In those jurisdictions where an insane person's contract is voidable, whether it is executed or not, and whether or not the other party acted in good faith and in ignorance of his mental infirmity, a person is not required to restore, or offer to restore, the consideration received by him as a condition precedent to the avoidance of a deed or other contract made by him while insane, though retention and use of the consideration after restoration to sound mind may, as in the case of infants, furnish evidence of ratification of the contract. One of the obvious grounds, it was said by the Massachusetts court, on which the deed of an insane man or an infant is held voidable, is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale; and the same incapacity which makes the deed voidable may have wasted the price, and rendered the restora-

<sup>224</sup> *Allis v. Billings*, 6 Metc. (Mass.) 416; *Gibson v. Soper*, 6 Gray (Mass.) 279; *Arnold v. Iron Works*, 1 Gray (Mass.) 434; *Turner v. Rusk*, 53 Md. 65.

<sup>225</sup> *Moore v. Hershey*, 9 Norris (Pa.) 190; *Halley v. Troester*, 72 Mo. 73; *McClain v. Davis*, 77 Ind. 419.

<sup>226</sup> *Beverley's Case*, 4 Coke, 123b; *Campbell v. Kuhn*, 45 Mich. 513; *Hovey v. Hobson*, 53 Me. 451; *Schuff v. Ransom*, 79 Ind. 458.

<sup>227</sup> *Allis v. Billings*, 6 Metc. (Mass.) 415; *Schuff v. Ransom*, 79 Ind. 458.

<sup>228</sup> *Carrier v. Sears*, 4 Allen (Mass.) 330; *Allen v. Berryhill*, 27 Iowa, 534; ante, p. 243. Contra, *Burke v. Allen*, 29 N. H. 106. Sureties are liable on a note executed by an insane person. *Lee v. Tandell*, 69 Tex. 34, 6 S. W. Rep. 665.

<sup>229</sup> *Gibson v. Soper*, 6 Gray (Mass.) 283; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434. Disaffirmance by action to avoid. *Hull v. Louth*, 109 Ind. 315, 10 N. E. Rep. 270; *Ashmead v. Reynolds*, 127 Ind. 441, 26 N. E. Rep. 80.

tion of the consideration impossible. "The law makes this very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of mature age and sound mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain which the infant may avoid; the sane to the obligation from which the insane may be loosed. It does not mean to put them on an equality. On the other hand, it intends that he who deals with infants or insane persons shall do it at his peril. \* \* \* If the law required restoration of the price as a condition precedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly, and the great purpose of the law in avoiding such contracts—the protection of those who cannot protect themselves—defeated."<sup>220</sup>

As we have already seen, however, most courts do not allow an insane person to avoid his contracts at all where the other party acted in good faith, and in ignorance of his insanity, and cannot be placed in statu quo.

#### *Avoidance as against Third Persons.*

The fact that third persons have acquired an interest under the contract of a person non compos mentis, in good faith, for value, and without notice of his infirmity, cannot defeat his right to avoid the contract.<sup>221</sup> This rule applies to deeds<sup>222</sup> and negotiable instruments<sup>223</sup> as well as to other contracts, and it applies whether the contract be regarded as void or merely voidable. To protect bona fide purchasers in such cases would be to withdraw protection from the insane person. The mere fact that it is so held would seem to show that the contract is not void, but voidable, however the courts

<sup>220</sup> *Gibson v. Soper*, 6 Gray (Mass.) 279; *Hovey v. Hobson*, 53 Me. 453.

<sup>221</sup> *Hovey v. Hobson*, 53 Me. 451; *Hull v. Louth*, 109 Ind. 315, 10 N. E. Rep. 270; *Long v. Fox*, 100 Ill. 43; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. Rep. 512.

<sup>222</sup> *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. Rep. 512. In North Carolina it is held that the deed of a lunatic, duly recorded, cannot be avoided as against bona fide purchasers. *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609.

<sup>223</sup> *Anglo-Californian Bank v. Ames*, 27 Fed. Rep. 727; *Wirebach v. First Nat. Bank*, 97 Pa. St. 543; *McClain v. Davis*, 77 Ind. 419.

may regard it; for, in reason, a contract that is void can have no effect. If it can have any effect at all as creating a right it is not void.<sup>234</sup>

### DRUNKEN PERSONS.

146. A contract made by a person while he is so drunk as to be incapable of understanding its nature and effect is voidable at his option, except that—

**EXCEPTIONS**—He is liable on contracts created by law, and for necessities.

147. The rules as to ratification and avoidance are substantially the same as in the case of infants and insane persons, except that some (but not all) courts hold that the contract cannot be avoided as against a bona fide purchaser.

As in the case of insanity, it was formerly considered that a man should be liable on a contract made while in a state of intoxication, on the ground that he should not be allowed to stultify himself by pleading his drunkenness; but the modern law places a drunken person, in respect of his capacity to contract, in the same position as an insane person. If his drunkenness is so excessive as to render him incapable of comprehending the nature and effect of his contract, it is voidable at his option, and it is immaterial that his drunkenness was voluntary, and not procured through the circumvention of the other party.<sup>235</sup> In the absence of fraud, slight intoxi-

<sup>234</sup> *Allis v. Billings*, 6 Metc. (Mass.) 415.

<sup>235</sup> *Barrett v. Buxton*, 2 Aiken (Vt.) 107; *Carpenter v. Rogers*, 61 Mich. 384, 28 N. W. Rep. 156; *Miller v. Finley*, 26 Mich. 254; *Gore v. Gibson*, 13 Mees. & W. 623; *Coulkins v. Fry*, 35 Conn. 170; *Johns v. Fritchey*, 39 Md. 258; *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. Rep. 80; *Foss v. Hildreth*, 10 Allen (Mass.) 76; *Matthews v. Baxter*, L. R. 8 Exch. 132; *Van Wyck v. Brasher*, 81 N. Y. 200; *Shackelton v. Seebree*, 86 Ill. 616; *Bates v. Ball*, 72 Ill. 108; *Mansfield v. Watson*, 2 Iowa, 111; *Warnock v. Campbell*, 25 N. J. Eq. 485; *French v. French*, 8 Ohio, 214; *Noel v. Karper*, 53 Pa. St. 97; *Cummings v. Henry*, 10 Ind. 109; *Reynolds v. Waller*, 1 Wash. (Va.) 104; *Newell v. Fisher*, 11 Smedes & M. (Miss.) 431; *Broadwater v. Darne*, 10 Mo. 277; *Pickett v. Sutter*, 5 Cal. 412; *Phelan v. Gardner*, 43 Cal. 306. But see *Reinskopf v. Rogge*, 37 Ind. 207.

cation does not affect the validity of a contract. It must be so excessive as to render him incapable of knowing what he is doing.<sup>236</sup> The contract, though voidable at the option of the drunken person, is binding on the other party, and cannot be attacked by third persons.<sup>237</sup> By the weight of authority, if a person has been judicially declared incapable of conducting his own affairs by reason of habitual drunkenness, and has been put in the custody and under the control of a committee or guardian, his contracts are absolutely void.<sup>238</sup>

As in the case of contracts of infants and insane persons, a person who was drunk, but not under guardianship, when he entered into a contract, may either avoid or ratify it when sober;<sup>239</sup> and ratification or disaffirmance may be by conduct showing an intention to ratify or to avoid it. Retention of the consideration, for instance, after becoming sober, or failure to disaffirm for an unreasonable time, would be a ratification.<sup>240</sup> Having once ratified the contract, it becomes binding, and he cannot retract his ratification, and avoid it.<sup>241</sup> On avoidance of the contract, the party must return or offer

It has been held that a person who, when sober, agrees to sign a contract, cannot avail himself of intoxication at the time of signature as a defense. *Page v. Krekey*, 63 Hun, 629, 17 N. Y. Supp. 764. In Minnesota it has been held that to set aside a mortgage on account of the mortgagor's intoxication it must appear that undue advantage was taken of his condition, or that his condition was caused by the mortgagee, or was known to him. *Youn v. Lamont* (Minn.) 57 N. W. Rep. 478.

<sup>236</sup> *Van Wyck v. Brasher*, 81 N. Y. 260; *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001; *Wilcox v. Jackson*, 51 Iowa, 208; *Van Horn v. Keenan*, 28 Ill. 445; *Peck v. Cary*, 27 N. Y. 9. And see cases cited in preceding note.

<sup>237</sup> *Matthews v. Baxter*, L. R. 8 Exch. 132; *Eaton v. Perry*, 29 Mo. 96.

<sup>238</sup> *Wadsworth v. Sharpsteen*, 8 N. Y. 388. Contra, *Appeal of Donehoe* (Pa. Sup.) 15 Atl. Rep. 924. This is true even of a negotiable instrument in the hands of a bona fide purchaser for value. *Wadsworth v. Sharpsteen*, supra. This does not apply to contracts for necessities. *McOrillis v. Bartlett*, 8 N. H. 569.

<sup>239</sup> See cases cited in note 235, supra. It may be avoided by his personal representatives. *Wigglesworth v. Steers*, 1 Hen. & M. (Va.) 70.

<sup>240</sup> *Williams v. Inabret*, 1 Bailey (S. C.) 343; *Reinskopf v. Rogge*, 37 Ind. 207; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. Rep. 753; *Mansfield v. Watson*, 2 Iowa, 111.

<sup>241</sup> *Matthews v. Baxter*, L. R. 8 Exch. 132; *Joest v. Williams*, 42 Ind. 565.

to return the consideration received by him,<sup>242</sup> though, if the consideration were wasted before becoming sober, this would probably not be required.<sup>243</sup>

Like an infant or an insane person, a drunken person is liable on contracts created by law, and is liable for necessities furnished him or his wife and children.<sup>244</sup>

As to whether drunkenness is a defense against persons in good faith acquiring rights for value under the contract,—as, for instance, against the bona fide holder of a negotiable instrument,—the authorities are conflicting. Some courts hold that total, but not partial, drunkenness, is a defense; while others hold that not even total drunkenness is a defense.<sup>245</sup>

### MARRIED WOMEN.

148. At common law, as a rule, a married woman, during coverture, is incapable of contracting. Her contracts are absolutely void.

**EXCEPTIONS AT COMMON LAW**—(a) She may acquire contractual rights by reason of personal services rendered by her, or take a chose in action, subject to her husband's right to reduce such rights to his possession.

(b) The wife of a person civilly dead could contract as a feme sole. Though the common law in this respect is not recognized with us, there are statutes in some states to the same effect.

**EXCEPTION IN EQUITY**—(c) In equity a married woman may have a separate estate, and contract in reference thereto as a feme sole.

<sup>242</sup> Joest v. Williams, 42 Ind. 565.

<sup>243</sup> Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. Rep. 311.

<sup>244</sup> Gore v. Gibson, 13 Mees. & W. 623; McCrillis v. Bartlett, 8 N. H. 569.

<sup>245</sup> State Bank v. McCoy, 69 Pa. St. 204; McSparran v. Neeley, 91 Pa. St. 17; Smith v. Williamson (Utah) 30 Pac. Rep. 753. For a good discussion of this question, see Norton, Bills & N. 208-213.

**EXCEPTIONS BY STATUTE—(d) In most jurisdictions, the common-law disabilities of married women have been virtually removed by statute.**

At common law, as a general rule, subject to exceptions which we will presently notice, a married woman is without capacity to enter into a valid contract. Her contracts are absolutely void.<sup>247</sup> It has been held that it makes no difference whether she is living with her husband or not.<sup>248</sup> An agreement of separation, for instance, by which the husband has secured to his wife a separate maintenance, it is said, cannot change their legal relationship so as to render her liable on her contracts;<sup>249</sup> nor can the fact that a wife has deserted her husband, and is living in adultery, render her liable.<sup>250</sup> Even a divorce a mensa et thoro does not give a woman power to bind herself by contract at common law,<sup>251</sup> though this is very generally changed by statute. Where, however, a husband deserts his wife absolutely and completely, and leaves the state, it is generally held in this country that the wife may contract and sue and be sued as a feme sole.<sup>252</sup>

<sup>247</sup> *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9; *Smith v. Plomer*, 15 East, 607; *Manby v. Scott*, 2 Smith, Lead. Cas. 375; *MacKinley v. McGregor*, 3 Whart. (Pa.) 369; *Tracy v. Keith*, 11 Allen (Mass.) 214; *Morris v. Norfolk*, 1 Taunt. 212; *Musick v. Dodson*, 76 Mo. 624; *Dobbin v. Hubbard*, 17 Ark. 189; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Hollis v. Francois*, 5 Tex. 195; *Stevens v. Parish*, 29 Ind. 260; *Burton v. Marshall*, 4 Gill (Md.) 487; *Hayward v. Barker*, 52 Vt. 429; *Porterfield v. Butler*, 47 Miss. 165; *Caldwell v. Walters*, 18 Pa. St. 79; *Pond v. Carpenter*, 12 Minn. 430 (Gil 315); *Farrar v. Bessey*, 24 Vt. 89; *Howe v. Wildes*, 34 Me. 506; *Young v. Paul*, 10 N. J. Eq. 404; *Tucker v. Cocke*, 32 Miss. 184; *Thompson v. Warren*, 8 B. Mon. (Ky.) 488. And see cases cited in *Ewell*, Lead. Cas. 312.

<sup>248</sup> *Harris v. Taylor*, 3 Sneed (Tenn.) 536. Contra, *Love v. Moynahan*, 16 Ill. 277.

<sup>249</sup> *Marshall v. Rutton*, 8 Term R. 545.

<sup>250</sup> *Meyer v. Haworth*, 8 Adol. & E. 467.

<sup>251</sup> *Faithorne v. Blaquiere*, 6 Maule & S. 73; *Lewis v. Lee*, 3 Barn. & C. 291. Contra, *Dean v. Richmond*, 5 Pick. (Mass.) 461; *Pierce v. Burnham*, 4 Metc. (Mass.) 303.

<sup>252</sup> *Gregory v. Pierce*, 4 Metc. (Mass.) 478; *Mead v. Hughes*, 15 Ala. 141; *Krebs v. O'Grady*, 23 Ala. 726; *Cheek v. Bellows*, 17 Tex. 613. See *Rogers*



As a rule, a married woman is liable for her torts, including her frauds, and may be sued in respect of such acts, jointly with her husband, or separately if she survives him; but, as in the case of infants, she cannot even be sued for her fraud where it is directly connected with her contract, and is part of the same transaction, though it is otherwise if the fraud is not connected with her contract.<sup>253</sup> False representations by a married woman that she is unmarried, or a widow, to induce a person to contract with her, will not estop her from pleading her coverture when sued upon the contract, though, like an infant under similar circumstances, she would no doubt be liable in an action for deceit.<sup>254</sup>

*Exceptions to the General Rule.*

To the general rule of the common law that a married woman cannot make a valid contract there are certain exceptions, both at common law and in equity; and by statutes in most jurisdictions the common-law doctrine has been almost abolished.

*Same—At Common Law.*

At common law a married woman may acquire contractual rights by reason of personal services rendered by her, or by reason of the assignment or execution to her of a chose in action, such as a bond or note.<sup>255</sup> The husband may reduce to his possession the rights so accruing to his wife; but, unless he does this by some act indicating an intention to deal with them as his own, they do not pass, like other personalty of the wife, into the estate of the husband, but survive to the wife if she outlives him, or pass to her personal representatives if she dies in his lifetime.

The wife of a man who was civilly dead by reason of his being under conviction of a felony had the same capacity to contract as a feme sole.<sup>256</sup> The old common-law doctrine of civil death from

v. Phillips, 8 Ark. 360. In regard to desertion by husband, and the effect of the husband's alienage, etc., see Metc. Cont. 98 et seq.

<sup>253</sup> Leake, Cont. 235; Liverpool Adelphi Loan Ass'n v. Fairhurst, 9 Exch. 422; Wright v. Leonard, 11 C. B. (N. S.) 258.

<sup>254</sup> Cannam v. Farmer, 3 Exch. 698; Liverpool Adelphi Loan Ass'n v. Fairhurst, 9 Exch. 422; Wright v. Leonard, 11 C. B. (N. S.) 258.

<sup>255</sup> Stevens v. Beals, 10 Cush. (Mass.) 29; Cobb v. Duke, 36 Miss. 60.

<sup>256</sup> Co. Litt. 132b; Hatchett v. Baddeley, 2 W. Bl. 1079, 1082; Carrol v. Blencow, 4 Esp. 27.

conviction of a felony, however, is not recognized in this country; but there are, in some states, statutes declaring that a man who is under a sentence of imprisonment in the penitentiary for life shall be deemed civilly dead. In such a case his wife would no doubt be deemed a feme sole, even in the absence of a special provision to that effect in the statute.

*Same—In Equity.*

In equity a married woman may have property settled upon her to her separate use, in which case she may dispose of it in the same manner as if she were a feme sole. In the exercise of this right, she may charge it with the liability to satisfy contracts made by her; and an engagement or security entered into by her, showing an intention to charge her separate property, will have that effect.<sup>257</sup> As said in an English case: "Courts of equity have, through the medium of trusts, created for married women rights and interests in property, both real and personal, separate and independent of their husbands. To the extent of the rights and interests thus created a married woman has, in courts of equity, power to alienate, to contract, to enjoy. She is considered a feme sole in respect of property thus settled or secured to her separate use."<sup>258</sup> It is presumed in general that a contract or engagement made by a married woman in writing imports an intention to charge her separate estate, otherwise the writing would have no meaning. If not in writing, it must be proved that the engagement was entered into with such an intention.<sup>259</sup> Under this rule, bonds, bills of ex-

<sup>257</sup> See *Hulme v. Tenant*, 1 Brown, Ch. 16; *Shattock v. Shattock*, L. R. 2 Eq. 182; *Jaques v. Methodist Church*, 17 Johns. (N. Y.) 549; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9; *Hollis v. Francols*, 5 Tex. 195; *Bradford v. Greenway*, 17 Ala. 797; *Dobbin v. Hubbard*, 17 Ark. 189; *Rogers v. Ward*, 8 Allen (Mass.) 387; *Smith v. Thompson*, 2 MacArthur (D. C.) 291; *Priest v. Cone*, 51 Vt. 495; *Willard v. Eastham*, 15 Gray (Mass.) 328; *Johnson v. Cummins*, 16 N. J. Eq. 97; *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482; *Kantrowitz v. Prather*, 31 Ind. 92; *Phillips v. Graves*, 20 Ohio St. 371; *Baker v. Gregory*, 28 Ala. 544.

<sup>258</sup> *Johnson v. Gallagher*, 3 De Gex, F. & J. 494.

<sup>259</sup> *Leake*, Cont. 238; *Kantrowitz v. Prather*, 31 Ind. 92; *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482; *Litton v. Baldwin*, 8 Humph. (Tenn.) 209. Her intention may be inferred from her course of dealing; as, for instance,

change, and promissory notes of a married woman are presumptively payable out of her separate estate.<sup>280</sup> It is very generally held that, where a debt contracted by a married woman is for the benefit of her separate estate, it will be chargeable in equity for the payment thereof, without regard to her intention.<sup>281</sup>

There are some limitations on the power of a married woman in respect to her separate property which should be noticed. She cannot sue or be sued alone in respect of the separate estate. She does not acquire a sort of equitable status of capacity to contract debts in respect of her separate estate, without regard to when it is acquired. She can only bind such separate estate as is in her possession or control at the time the liabilities accrue. She cannot bind herself nor create liabilities in excess of her estate. Her creditor's remedy is not against her, but against her property.<sup>282</sup>

*Same—Disability Removed by Statute.*

What has thus far been said on this subject has reference only to the common law, and to modifications of the common-law rule by courts of equity, irrespective of any statute. This law has of late years been almost universally changed by statutes both in this country and in England. It is never safe to assume that the old law is still in force, for in most jurisdictions it is not. The statutes vary so much in the different states that it would be impracticable to attempt to state the law at the present time. Further than this, there is scarcely a session of the legislature at which

where she contracts debts while living apart from her husband. *Johnson v. Cummins*, 16 N. J. Eq. 97. Or where she knows her creditors look to her separate estate for payment. *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482.

<sup>280</sup> *Tullett v. Armstrong*, 4 Beav. 319; *Phillips v. Graves*, 20 Ohio St. 371; *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482; *Dobbin v. Hubbard*, 17 Ark. 189; *Rogers v. Ward*, 8 Allen (Mass.) 387.

<sup>281</sup> *Willard v. Eastham*, 15 Gray (Mass.) 328; *Rogers v. Ward*, 8 Allen (Mass.) 387; *James v. Mayrant*, 4 Desaus. Eq. (S. C.) 591; *Yale v. Dederer*, 22 N. Y. 450; *Johnson v. Cummins*, 16 N. J. Eq. 97; *Dyett v. Coal Co.*, 20 Wend. (N. Y.) 570; *Dale v. Robinson*, 51 Vt. 20; *Patrick v. Littell*, 36 Ohio St. 79; *McCormick v. Holbrook*, 22 Iowa, 487. Liability for medical attendance and funeral expenses. *McClellan v. Filson*, 44 Ohio St. 184, 5 N. E. Rep. 861.

<sup>282</sup> *Picard v. Hire*, 5 Ch. App. 277.

some new change in the law is not made. It is impossible to go into the matter here, nor, indeed, would it be advisable, if possible, for the powers of married women form part of a branch of the law distinct from contract.

### CORPORATIONS.

**149.** A corporation, by reason of its artificial nature, can only contract through a duly-authorized agent.

**150.** Formerly, with certain exceptions, it could only contract under its corporate seal; but now, unless restricted by its charter or act of incorporation or by some statute, it may contract in the same manner as a natural person.

**151.** Like a natural person, it may be liable on a contract created by law.

**152.** The power of a corporation to enter into a contract is limited in respect of the subject-matter only by its charter or act of incorporation or by other statutes binding on it. Except as so restricted, it has the implied power to enter into any contract which is not foreign to the purposes of its incorporation.

**153.** An attempted contract, which is not within the powers of a corporation, is said to be *ultra vires*, and is void.

**154.** If, however, a corporation accepts the benefit of performance of an *ultra vires* contract by the other party, it cannot escape liability to pay therefor, but is liable as on a contract created by law.

A corporation is an artificial person, consisting of one or more natural persons, created by law, and continued by a succession of members. It is an artificial entity apart from the persons who compose it. The latter do not themselves constitute the corporation, but are only its members for the time being, and their corporate rights and liabilities are something distinct from their individual rights and liabilities.

Being an artificial entity apart from the persons who compose it, and having no person itself, but merely an ideal existence, it

follows that it can contract only by means of an agent. It "cannot act in its own person, for it has no person."<sup>263</sup> It cannot act through one or any number of its members, merely as such, for, though they compose the corporation, they are not the corporation. It must act through an agent expressly authorized to act for it. Where, for instance, a person pretending to be, but not being in fact, the mayor of a municipal corporation, put the seal of a corporation to a deed, it was held that it did not thereby become the deed of the corporation;<sup>264</sup> and where an agent intrusted with the seal of a corporation applied it without authority to a power of attorney for the sale of stock, and obtained the proceeds, it was held that the unauthorized use of its seal did not bind the corporation.<sup>265</sup>

*Mode of Contracting—Seal.*

At common law the general rule was that a corporation could only manifest its intention by the use of its corporate seal. "A corporation," said Blackstone, "being an invisible body, cannot manifest its intention by any personal act or oral discourse. It therefore speaks and acts only by its common seal. For, though the particular members may express their private consents to any act by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."<sup>266</sup> To this common-law rule there were numerous exceptions, based on necessity or convenience. "The general rule of law," said Lord Denman, "is that a corporation contracts under its common seal. As a general rule, it is only in that way that a corporation can express its will or do any act. That general rule, however, has from the earliest traceable periods been subject to exceptions." The principle on which they have been established "appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior

<sup>263</sup> Per Lord Cairns, in *Ferguson v. Wilson*, 2 Ch. 99.

<sup>264</sup> Anonymous, 12 Mod. 423.

<sup>265</sup> *Bank of Ireland v. Evans Charities*, 5 H. L. Cas. 389.

<sup>266</sup> 1 Bl. Comm. 475.

servant, the doing of acts frequently recurring or too insignificant to be worth the trouble of affixing the common seal, are established exceptions. On the same principle stands the power of accepting bills of exchange and issuing promissory notes by companies incorporated for the purpose of trade, with the rights and liabilities consequent thereon."<sup>267</sup>

The doctrine of the common law, as above stated, that a corporation can only contract by the use of its corporate seal, is no longer recognized in this country. Unless the charter or act of incorporation or some statute provides otherwise, it need only use a seal where an individual would be required to use one. In all cases where it is not expressly so restricted, it may, like a natural person, contract under seal, or by writing not under seal, or orally.<sup>268</sup> Like a natural person, also, it can ratify any contract made by an agent which it could have authorized the agent to make,<sup>269</sup> and it may be liable on contracts implied as a fact from corporate acts,<sup>270</sup> or created by law because of a legal duty on its part.<sup>271</sup>

"Anciently," as said by Judge Story, "it seems to have been held that corporations could not do anything without deed. Afterwards the rule seems to have been relaxed, and they were, for convenience sake, permitted to act in ordinary matters without deed,—as to retain a servant, cook, or butler,—and gradually this relaxation widened to embrace other objects. At length it seems to have been established that, though they could not contract directly,

<sup>267</sup> *Church v. Imperial Gas Co.*, 6 Adol. & E. 861.

<sup>268</sup> *Bank of Columbia v. Patterson*, 7 Cranch, 290; *Danforth v. Schoharie*, etc., Road, 12 Johns. (N. Y.) 227; *School Dist. v. Wood*, 13 Mass. 193; *Bank of the United States v. Dandridge*, 12 Wheat. 64; *Moss v. Averell*, 10 N. Y. 457; *Regents v. Detroit Young Men's Soc.*, 12 Mich. 138; *Board of Education v. Greenbaum*, 39 Ill. 609; *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Town of Athens v. Thomas*, 82 Ill. 239; *Blunt v. Walker*, 11 Wis. 334; *Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) at page 16; *Christian Church v. Johnson*, 53 Ind. 273; *City of Selma v. Mullen*, 46 Ala. 411; *Bank v. Poltiaux*, 3 Rand. (Va.) 136; *Canal Co. v. Knapp*, 9 Pet. 541.

<sup>269</sup> *Peterson v. Mayor*, etc., of New York, 17 N. Y. 450.

<sup>270</sup> *Proprietors of the Canal Bridge v. Gordon*, 1 Pick. (Mass.) 297; *Bank of Columbia v. Patterson*, 7 Cranch, 299.

<sup>271</sup> *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Hall v. Mayor of Swansea*, 5 Q. B. 526; *Jefferys v. Gurr*, 2 Barn. & Adol. 833; *Seagraves v. Alton*, 13 Ill. 366; *Trustees v. Ogden*, 5 Ohio, 23.

except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. \* \* \* The technical doctrine that a corporation could not contract except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law that, wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made with its authorized agents are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie."<sup>272</sup>

If the charter or act of incorporation, or any other statute, expressly prescribes a certain mode or form for entering into contracts, as is frequently the case, that form and mode must be strictly followed.<sup>273</sup> The statutory provision, however, must be mandatory, and not merely directory.<sup>274</sup> This, of course, depends on the intention of the legislature.

*What Contracts are Authorized.*

The power of a corporation to enter into contracts is limited, in respect of the matter of the contract, by the charter or act of incorporation, and by other statutes binding upon it. Being a creature of the legislature, it can only make such contracts as are expressly or impliedly authorized by the legislature. It exists for no other purpose, and has no greater capacity or powers, than are conferred by its creation; and contracts which exceed the limits of those powers are void.<sup>275</sup>

<sup>272</sup> *Bank of Columbia v. Patterson*, supra.

<sup>273</sup> *Head v. Providence Ins. Co.*, 2 Cranch, 127, at page 169; *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 3 Sup. Ct. Rep. 555.

<sup>274</sup> *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110; *Witte v. Derby Fishing Co.*, 2 Conn. 260; *Bulkley v. Same*, 2 Conn. 252.

<sup>275</sup> *Leake*, Cont. 258.

The question whether the terms of incorporation are the measure of the contracting powers of the corporation, or whether they are merely prohibitory of contracts which are inconsistent with them, was thus stated and answered in an English case by Blackburn, J.: "I take it that the true rule of law is that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, as a natural person has. And this is important when we come to construe the statutes creating a corporation, for if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, does the statute creating the corporation by express provision or necessary implication show an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, does the statute creating the corporation by express provision or necessary implication show an intention in the legislature to prohibit, and so avoid, the making of a contract of this particular kind?" <sup>276</sup>

Power to enter into a particular contract need not be expressly conferred. By implication a corporation is given power to enter into any contract which is not foreign to the purposes of its incorporation, and is not prohibited by its charter or by some statute which is binding on it.<sup>277</sup> "When the legislature," it has been said, "constitutes a corporation, it gives to that body prima facie an absolute right of contracting. But this prima facie right does not exist in any case where the contract is one which, from the

<sup>276</sup> *Ashbury Carriage Co. v. Riche*, L. R. 9 Exch. 224.

<sup>277</sup> *Booth v. Robinson*, 55 Md. 419; *Louisville, C. & C. R. Co. v. Litson*, 2 How. 558; *Moss v. Averell*, 10 N. Y., at page 457; *State v. Rice*, 65 Ala. 83; *Dodge v. City of Council Bluffs*, 57 Iowa, 560, 10 N. W. Rep. 886. Contra, *Searight v. Payne*, 6 Lea (Tenn.) 283; *Davis v. Old Colony R. Co.*, 131 Mass. 253; *Cleveland, etc., R. Co. v. Furnace Co.*, 37 Ohio St. 321; *Bangor Boom Co. v. Whiting*, 29 Me. 123; *Metropolitan Bank v. Godfrey*, 23 Ill. 602; *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. Rep. 221; *Eureka, etc., Works v. Bresnahan*, 60 Mich. 332, 27 N. W. Rep. 524; *Home Ins. Co. v. Packing Co.*, 32 Iowa, 223; *Vandall v. Dock Co.*, 40 Cal. 83.



nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making." <sup>278</sup>

To borrow money for carrying on their business,<sup>279</sup> and to give a mortgage to secure their debts,<sup>280</sup> to receive or give negotiable paper,<sup>281</sup> to buy and sell land,<sup>282</sup> are all acts within the power of the corporation if they are acting within their proper sphere, and in carrying out the purposes for which they were incorporated; but not otherwise.<sup>283</sup> Any contract which is necessary or reasonably incidental to the accomplishment of the objects for which a corporation was created, and which is not expressly prohibited, is within the scope of its powers.<sup>284</sup>

*Ultra Vires Contracts—Not Illegal.*

A contract by a corporation, made *ultra vires*,—that is, without the power to make it,—is void. It is sometimes said to be void on the ground of illegality, but this is not correct. It is not the object of the parties, but the fact that one of them—the corporation—wants the necessary capacity, that avoids the contract.<sup>285</sup>

*Same—Effect.*

Since a contract is not illegal merely because it is *ultra vires*, rights and liabilities may arise from the transaction. If the other

<sup>278</sup> South Yorkshire R. Co. v. Great Northern R. Co., 9 Exch. 84.

<sup>279</sup> Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248.

<sup>280</sup> Jackson v. Brown, 5 Wend. (N. Y.) 590; Thompson v. Lambert, 44 Iowa, 230; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392; Gordon v. Preston, 1 Watts (Pa.) 385; Fifth Ward Bank v. First Nat. Bank, 48 N. J. Law, 513, 7 Atl. Rep. 318.

<sup>281</sup> Moss v. Averell, 10 N. Y. 440; Moss v. Oakley, 2 Hill (N. Y.) 265; Goodrich v. Reynolds, 31 Ill. 490; Hardy v. Merriweather, 14 Ind. 203. But see Bacon v. Insurance Co., 31 Miss. 116.

<sup>282</sup> Phillips Academy v. King, 12 Mass. 546; Rehoboth v. Rehoboth, 23 Pick. (Mass.) 139; Blanchard's etc., Factory v. Warner, 1 Blatchf. 258, Fed. Cas. No. 1,521; Buell v. Buckingham, 16 Iowa, 284.

<sup>283</sup> Jackson v. Hartwell, 8 Johns. (N. Y.) 330; First Parish in Sutton v. Cole, 3 Pick. (Mass.) 232; Occum Co. v. Sprague Manufg Co., 34 Conn. 529.

<sup>284</sup> Curtis v. Leavitt, 15 N. Y. 64; Brown v. Minnisimmet Co., 11 Allen (Mass.) 334; West v. Madison Co. Agricultural Board, 82 Ill. 207; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 546, 13 N. E. Rep. 169.

<sup>285</sup> Anson, Cont. 115; Bissell v. Michigan, etc., R. Co., 22 N. Y., at page 269; Whitney Arms Co. v. Barlow, 63 N. Y., at page 68.

party has performed his part, so that the corporation has received a benefit, either in money, services, or property, the corporation will be compelled to pay for them.<sup>286</sup> It cannot escape liability on the ground that the contract was ultra vires. Its liability, in such case, however, does not spring from the contract, for that is void; but results by implication of law from its receipt of the benefit of the other party's performance.

*Should not allow doing indirectly, what can not be done directly.*

<sup>286</sup> Morville v. American Tract Soc., 123 Mass. 129; Dill v. Wareham, 7 Metc. (Mass.) 438; Whitney Arms Co. v. Barlow, 63 N. Y. 63; Madison Ave. Church v. Baptist Church, 73 N. Y. 82; Rider Life Raft Co. v. Roach, 97 N. Y. 378; Slater Woolen Co. v. Lamb, 143 Mass. 420, 9 N. E. Rep. 823; City of Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. Rep. 442; Chapman v. Douglass Co., 107 U. S. 348, 2 Sup. Ct. Rep. 62; Bradley v. Ballard, 55 Ill. 413; Darst v. Gale, 83 Ill. 136; East St. Louis v. East St. Louis Co., 98 Ill. 415; Peoria & S. R. Co. v. Thompson, 103 Ill. 187; Brown v. Scottish-Am. Mortg. Co., 110 Ill. 235.

## CHAPTER VII.

### REALITY OF CONSENT.

#### 155. In General.

156-162. Mistake.

163-166. Misrepresentation.

167-169. Fraud.

170-172. Duress.

173-174. Undue Influence.

#### IN GENERAL.

**155. The mutual consent which is essential to every agreement must be real. There may be no real consent, and therefore no contract, because of**

- (a) Mistake,**
- (b) Misrepresentation,**
- (c) Fraud,**
- (d) Duress, or**
- (e) Undue influence.**

The next feature in the formation of contract to be considered is genuineness or reality of consent. We have seen that mutual consent is essential to every agreement, and that, with few exceptions, agreement is an essential element in contract. Therefore, as a general rule, there can be no binding contract where there is no real consent. If, then, we have an apparent agreement possessing the element of form or consideration, or both, and made between parties capable of contracting, we must ask whether the consent of both or either of the parties was given under such circumstances as to make it no real expression of their intention.

There may be various causes for unreality of consent: (1) The parties may not have meant the same thing; or one or both, while meaning the same thing, may have formed untrue conclusions as to the subject-matter of the agreement. This is Mistake. (2) One of the parties may have been led to form untrue conclusions respecting the subject-matter of the agreement by statements innocently

made, or facts innocently withheld by the other. This is Misrepresentation. (3) These untrue conclusions may have been induced by intentional misrepresentations or active concealment by the other party, or intentional concealment where there was a duty to disclose, for the purpose of deceiving. This is Fraud. (4) The consent of one of the parties may have been extorted from him by the other by actual or threatened personal violence or imprisonment, or, under some circumstances, by threatened injury to property. This is Duress. (5) Circumstances may have rendered one of the parties morally incapable of resisting the will of the other, so that his consent was no real expression of intention. This is Undue Influence.

We will now deal with each of these causes in turn.

#### MISTAKE.

156. Mistake is where the parties did not mean the same thing, or where one or both, while meaning the same thing, formed untrue conclusions as to the subject-matter of the agreement.

157. When it has any effect at all, it renders the contract void; and it has such effect in the following cases only:

- (a) Where the mistake was as to the nature of the transaction, and was induced by the deceit or other fault of a third party against which ordinary diligence could not guard.
- (b) Where the mistake was as to the person with whom the contract was made, and the intention was to contract with a definite person.
- (c) Where the mistake was as to the subject-matter of the contract; but this only applies where it was:
  - (1) As to the existence of the subject-matter.
  - (2) As to the identity of the subject-matter. This applies only where what was meant by each party answers the description of the subject-matter.

- (3) As to the essential nature or qualities of the subject-matter. This applies only where the mistake goes to the whole substance of the agreement, and renders the subject-matter contracted for essentially different in kind from the thing as it actually exists, and where the mistake was mutual.
- (4) As to the quantity of the subject-matter.
- (5) As to the price to be paid.
- (d) Where one of the parties was mistaken as to the nature of the promise made, and the other party knew of the mistake. This, however, is generally regarded with us as a case of fraud.

158. Mistake of law by reason of which the parties did not understand the legal effect of their contract does not avoid it. Mistake as to foreign laws, however, or as to ownership, is mistake of fact.

It must be borne in mind that we are here dealing with the formation of contract, and not with its interpretation. We are to consider how mistake will prevent a contract from being formed at all. We are dealing with mistake of intention, and not mistake of expression. The parties may be genuinely agreed on the terms of their contract, but the terms may, by mistake, be so expressed as to hinder or pervert the operation of their agreement. For instance, the parties may both intend to contract for the sale of one particular tract of land, but the written agreement may, by mistake, describe another tract. In these cases they may be permitted to explain the contract, or the court may correct the mistake. This is mistake of expression, and pertains to the interpretation of contracts, and not to their formation. We will deal with the question in a subsequent chapter. If parties contract for the sale of an article which, unknown to them, does not in fact exist, or if a person contracts with one man, intending to contract with another, this is a mistake of intention; and it is of this sort of mistake that we are to deal here.

The almost universal rule is that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence, or oppression. If he has exhibited all the outward signs of agreement, the law will hold that he has agreed. As a rule, a person cannot avoid his contract simply by showing that he has made a mistake. There are some exceptions to the rule, which we will now consider.

*Mistake as to the Nature of the Transaction.*

There may be cases in which a contract will be void because of a mistake as to the nature of the transaction; but this must needs be of rare occurrence, for men are not apt to enter into engagements of the nature of which they are ignorant. A case like this must arise almost of necessity from the misrepresentation of a third party. If a man, for instance, is capable of understanding the nature of a document, he cannot avoid its operation by saying that he did not apply his mind to its contents, or that he did not suppose it would have any legal effect.<sup>1</sup> He must have been induced to contract by some deceit or misrepresentation which ordinary diligence could not penetrate; and this, in order to result in mistake, must have proceeded from some third party, for, if it proceeded from the other party to the contract, the ground of avoidance would be misrepresentation or fraud, and not mistake. Where, for instance, by the misrepresentation of a third person a grantor is reasonably led to believe that his deed is for a smaller quantity of land than it in fact conveys, and he only intends to convey the smaller quantity, the grantee acting innocently in the matter, the deed may be avoided on the ground that his mind never assented to its terms.<sup>2</sup> Of course, he must not have been guilty of negligence in relying on the representation.<sup>3</sup>

In a leading case on the subject of mistake, the acceptor of a bill of exchange had induced a person to indorse it by telling him

<sup>1</sup> *Hunter v. Walters*, L. R. 7 Ch. 81; *Cannon v. Lindsay*, 85 Ala. 198, 3 South. Rep. 676. And see *Kennerty v. Etiwan Co.*, 21 S. C. 226; *Little v. Little*, 2 N. D. 175, 49 N. W. Rep. 736; *Quimby v. Shearer* (Minn.) 58 N. W. Rep. 155; *Van Sickles v. Town*, 53 Iowa, 259, 5 N. W. Rep. 148; *Campbell v. Van Houten*, 44 Mo. App. 231.

<sup>2</sup> *De Perez v. Everett*, 73 Tex. 431, 11 S. W. Rep. 388.

<sup>3</sup> See notes 1, *supra*, and 124, *infra*.

that it was a guaranty. It was held that the bill did not bind him even in the hands of a bona fide purchaser for value. It is "plain, on principle and on authority," said the court, "that if a blind man, or a man who cannot read, and who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended."<sup>4</sup> In this case the contract was absolutely void on the ground of mistake, and therefore it could be avoided even in the hands of the bona fide holder. Had the ground of avoidance been fraud, it would, as we shall presently see, have been voidable only, and could not have been avoided after passing into the hands of a bona fide holder.

The absence of negligence is strongly dwelt upon by the court in this case, and the jury had expressly negatived its existence. In some of the cases in this country following the case mentioned, the decision is put on the ground that the mind of the signer did not accompany the signature; but in all of these cases, as in the case mentioned, absence of negligence was strongly dwelt upon, and it is virtually settled that a person cannot avoid a note

<sup>4</sup> *Foster v. McKinnon*, L. R. 4 C. P. 704. And see *Gibbs v. Linabury*, 22 Mich. 479; *Thoroughgood's Case*, 2 Coke, 9; *Kagel v. Totten*, 59 Md. 447; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. Rep. 818; *Whitney v. Snyder*, 2 Lans. (N. Y.) 477; *Schuylkill Co. v. Copley*, 67 Pa. St. 386; *Cline v. Guthrie*, 42 Ind. 227; *Walker v. Ebert*, 29 Wis. 194; *Puffer v. Smith*, 57 Ill. 527; *Soper v. Peck*, 51 Mich. 563, 17 N. W. Rep. 57; *De Camp v. Hamma*, 29 Ohio St. 467; *Trombly v. Ricard*, 130 Mass. 259; *Corby v. Weddle*, 57 Mo. 452; *Detwiler v. Bish*, 44 Ind. 70; *Baldwin v. Bricker*, 86 Ind. 221; *Hewett v. Jones*, 72 Ill. 208; *Rockford, R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. Rep. 710; *Schaper v. Schaper*, 84 Ill. 603; *Van Brunt v. Singley*, 85 Ill. 281; *Easterly v. Eppelsheimer*, 73 Iowa, 260, 34 N. W. Rep. 846.

or bill of exchange or deed, as against a bona fide purchaser for value, on the ground that through fraud and circumvention he was induced to sign, not knowing the nature of the instrument, unless he shows that he was not guilty of negligence. If he shows this, but not otherwise, the instrument is invalid, even as against a bona fide purchaser.<sup>5</sup> There are some cases which hold that the instrument cannot be avoided in the hands of a bona fide holder, even though there was no negligence;<sup>6</sup> but the great weight of authority is in favor of the rule above stated.

*Mistake as to the Person with Whom the Contract is Made.*

A mistake as to the person with whom the contract is made may avoid it; as, for instance, where a contract is made with one person under a belief that it is being made with another. Such a mistake can only arise where the person so contracting has in contemplation a definite person with whom he desires to contract. It cannot affect general offers which any one may accept, such as offers by advertisement and offers to sell goods for ready money. Where a man intends to contract with one person, another cannot make himself a party to the contract by substituting himself; for, in the first place, a man, in entering into a contract, looks to the credit and character of the person with whom he supposes he is contracting,<sup>7</sup> and, in the second place, the person who thus substitutes himself is never present in the mind of the other party, and the latter, therefore, does not consent to a contract with him. Where a man

<sup>5</sup> *Chapman v. Rose*, 56 N. Y. 138; *Abbott v. Rose*, 62 Me. 194; *Taylor v. Atchison*, 54 Ill. 196; *Carey v. Miller*, 25 Hun. (N. Y.) 28; *Mackey v. Peterson*, 29 Minn. 298, 13 N. W. Rep. 132; *Upton v. Tribilcock*, 91 U. S. 50; *Gavogan v. Bryant*, 83 Ill. 376; *Lach v. Nichols*, 55 Ill. 273; *Holmes v. Hale*, 71 Ill. 552; *Ross v. Doland*, 29 Ohio St. 473; *De Camp v. Hamma*, 29 Ohio St. 471; *Douglas v. Matting*, 29 Iowa, 498; *Fayette Co. Sav. Bank v. Steffes*, 54 Iowa, 214; 6 N. W. Rep. 267; *Fisher v. Van Behren*, 70 Ind. 19; *Millard v. Barton*, 13 R. I. 601; *Ruddell v. Dillman*, 73 Ind. 518; *Williams v. Stoll*, 79 Ind. 80; *Baldwin v. Barrows*, 86 Ind. 351; *Putnam v. Sullivan*, 4 Mass. 45; *Ort v. Fowler*, 31 Kan. 478, 2 Pac. Rep. 580; *Weller's Appeal*, 103 Pa. St. 594; *Johnston v. Patterson*, 114 Pa. St. 398, 6 Atl. Rep. 746; *Shirts v. Overjohn*, 60 Mo. 305; *Citizens' Nat. Bank v. Smith*, 55 N. H. 593. And see cases cited in the preceding note. See, also, post, p. 354, and note 183.

<sup>6</sup> *First Nat. Bank v. Johns*, 22 W. Va. 520 (collecting cases).

<sup>7</sup> *Humble v. Hunter*, 12 Q. B. 311; *Boston Ice Co. v. Potter*, 123 Mass. 28.



imitated another's signature, and thereby induced persons to supply him with goods under the belief that they were supplying the person whose signature was imitated, it was held that there was no contract with the person so procuring the goods. "Of him," says Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required."<sup>8</sup>

In this case the mistake was induced by fraud, but an innocent mistake may produce the same result. Thus, where an order for goods was sent to a particular person, and a man who had succeeded to his business filled the order without giving notice of the change, it was held that he could not recover the price of the goods. "In order to entitle the plaintiff to recover," it was said, "he must show that there was a contract with himself."<sup>9</sup> And on the same principle, if a man sells goods to another, representing that he is the owner, and the other party intends to buy from him, there is no contract with the real owner, who was the undisclosed principal of the seller, for "every man has a right to elect what parties he will deal with."<sup>10</sup> So, also, if a man obtains goods from another by falsely representing that he is the agent of another person, to whom the owner of the goods thinks he is selling them, the sale is void.<sup>11</sup> To render the sale void, however, there must be a false

<sup>8</sup> *Cundy v. Lindsay*, L. R. 3 App. Cas. 465.

<sup>9</sup> *Boulton v. Jones*, 2 Hurl. & N. 564. And see *Boston Ice Co. v. Potter*, 123 Mass. 28; *Randolph Iron Co. v. Elliott*, 34 N. J. Law, 184; *Gregory v. Wendell*, 40 Mich. 443; *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. Rep. 367; *Winchester v. Howard*, 97 Mass. 303.

<sup>10</sup> *Winchester v. Howard*, 97 Mass. 303; *Mitchell v. Ralston*, 45 Mo. App. 273. It is not meant to say that an agent must always disclose his agency. An agent may sell the property of his principal without disclosing the fact that he acts as an agent, or that the property is not his own; and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. *Huntington v. Knox*, 7 Cush. (Mass.) 371; ante, p. 158; post, pp. 513, 740, 742.

<sup>11</sup> *Hardman v. Booth*, 1 Hurl. & C. 803; *Hollins v. Fowler*, L. R. 7 H. L. 757; *Hamet v. Litcher*, 37 Ohio St. 356; *Hentz v. Miller*, 94 N. Y. 67; *Barker*

representation that the agency exists, and not merely belief in its existence on the part of the seller, and intent to sell to the supposed principal.<sup>12</sup>

In this country there is doubt whether, in the case of mistake as to the identity of the person with whom the contract is made, caused by fraudulent representations, the contract is absolutely void, and of no effect at all, on the ground of the mistake, or simply voidable on the ground of the fraud, so that a third person may bona fide acquire rights preventing its avoidance. In England it is held void for mistake,<sup>13</sup> but in Massachusetts it is held voidable only on the ground of fraud.<sup>14</sup>

*Mistake as to Subject-Matter of Contract.*

If a man knows the nature of the transaction, and the party with whom he is entering into legal relations, it is, for the most part, his own fault if the subject-matter of the contract—the thing contracted for and the terms of the bargain—is not what he supposed. “If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”<sup>15</sup> And so, if the parties are agreed in clear terms, and one of them does not get what he anticipates under the contract, this is, if anything, failure of performance, and not mistake. It may be that the promisor offered more than he could perform, under a mistaken impression as to his powers, his judgment, or his rights. If he did so, he is liable for his default, for every one who enters into a contract must be presumed to believe that he can perform

v. *Dinsmore*, 72 Pa. St. 427; *Edmunds v. Merchants' Transp. Co.*, 135 Mass. 283. So, also, where a person obtains goods by falsely representing that he is a member of a firm, and gives in payment a forged check of the firm. *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. Rep. 433, and 5 N. E. Rep. 908; *Moody v. Blake*, 117 Mass. 23. So, also, where a person obtains goods by falsely representing that he is the agent of an undisclosed principal. *Rodliff v. Dollinger*, 141 Mass. 1, 4 N. E. Rep. 805.

<sup>12</sup> *Stoddard v. Ham*, 129 Mass. 383.

<sup>13</sup> *Cundy v. Lindsay*, *supra*.

<sup>14</sup> *Edmunds v. Merchants' Transp. Co.*, 135 Mass. 283.

<sup>15</sup> Per *Blackburn, J.*, in *Smith v. Hughes*, L. R. 6 Q. B., at page 607.

it, and that it is his interest to do so, and in like manner that the other party can and will perform it. If this belief is erroneous, the error will not avoid the contract, though nonperformance on one side may relieve the other from his liabilities under the contract, and must entail payment of damages. The question is not what the parties thought, but what they said and did. Suppose a person sells another, and the latter believes that he is buying, this bar of gold, this case of champagne, or this barrel of oysters. The bar turns out to be brass, the case to contain sherry, the barrel to contain oatmeal. The parties are honestly mistaken as to the subject-matter of the contract, but their mistake has nothing to do with their respective rights. These depend on the answer to the question: Was the article sold a bar of metal or a bar of gold, a case of wine or a case of champagne, a barrel of provisions or a barrel of oysters? A contract for a bar of gold is not performed by the delivery of a bar of brass. A contract for a bar of metal leaves each party to take his chance as to the quality of the thing contracted to be sold, but this, again, would not be performed by the delivery of a bar of wood painted to look like metal. The cases cited in illustration of the rule that a man is not bound to accept a thing substantially different from that which he bargained for<sup>16</sup> have nothing to do with the formation of contract, and we must keep these questions of mistake and failure of consideration clearly apart. Mistake prevents what failure of consideration implies,—the existence of a contract.

Mistake as to the subject-matter of a contract will only avoid it at law in a few cases. Equity, however, may grant relief in cases where the law may afford no remedy.<sup>17</sup>

*Same—Mistake as to Existence of Subject-Matter.*

If the agreement is in respect of a thing which, unknown to both parties, does not exist at the time of entering into the contract, the mistake goes to the very root of the matter, and avoids the contract. Such a mistake is in fact a phase of the subject of impossibility of performance; but, inasmuch as the thing agreed upon has ceased

<sup>16</sup> Gompertz v. Bartlett, 2 El. & Bl. 849; Couder v. Hall, 28 B. (N. S.) 22.

<sup>17</sup> See Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. Rep. 61; Geib v. Reynolds, 35 Minn. 331, 28 N. W. Rep. 923; Fleetwood v. Brown, 109 Ind. 567, 9 N. E. Rep. 352, and 11 N. E. Rep. 779; Thwing v. Lumber Co., 40 Minn. 184, 41 N. W. Rep. 815.

to be possible before the agreement, such impossibility prevents a contract from ever arising, and does not operate, as impossibility arising subsequent to the agreement will sometimes operate, as a form of discharge. One of the leading English cases on this subject arose out of a sale of a cargo of corn which was supposed by the parties, at the time of the sale, to be on its voyage to England, but which, in fact, having become heated on the voyage, had been unloaded and sold. It was held that the contract was void, inasmuch as it "plainly imported that there was something which was to be sold at the time of the contract, and something to be purchased," whereas the object of the sale had ceased to exist.<sup>18</sup> So, also, where a person purchased an annuity which, at the time of the purchase, had ceased to exist owing to the death of the annuitant, it was held that he could recover the price which he had paid for it.<sup>19</sup> There are some cases seemingly at variance with this rule, but they are cases in which the contract was absolute, and not impliedly conditional upon the existence of the subject-matter.<sup>20</sup>

*Same—Mistake as to Identity of Subject-Matter.*

An agreement may be void where there is a mistake as to the identity of the subject-matter; as, for instance, where the contract

<sup>18</sup> *Conturlier v. Hastie*, 5 H. L. Cas. 673; *Allen v. Hammond*, 11 Pet. 63; *Gibson v. Pelkie*, 37 Mich. 380; *Thompson v. Gould*, 20 Pick. (Mass.) 134; *Ketchum v. Catlin*, 21 Vt. 191; *Silvernall v. Cole*, 12 Barb. (N. Y.) 685; *King v. Doolittle*, 1 Head (Tenn.) 77; *Scioto Fire Brick Co. v. Pond*, 38 Ohio St. 65; *Bradford v. City of Chicago*, 25 Ill. 411, 423; *Anderson v. Armstead*, 69 Ill. 452.

<sup>19</sup> *Strickland v. Turner*, 7 Exch. 208. And see *Cochran v. Willis*, L. R. 1 Ch. App. 58.

<sup>20</sup> *Barr v. Gibson*, 3 Mees. & W. 390; *Hills v. Sughrue*, 15 Mees. & W. 253. "The parties to an agreement must be acquainted with the extent of their rights and the nature of the information they can call for respecting them, else they will not be bound. The reason is that they proceed under an idea that the fact which is the inducement to the contract is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event. But where the parties treat upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party that would affect any other contract." *Perkins v. Gay*, 3 Serg. R. (Pa.) 327.

is in reference to a thing of a certain name, and one of the parties thinks he is contracting for one thing that answers the description, while the other party thinks it is something else which also answers the description. Thus, where a person agreed to buy a cargo of cotton "to arrive ex Peerless from Bombay," and there were two ships of that name, and the buyer meant one, and the seller the other, it was held that there was no contract, and that the buyer was not bound to accept a cargo which, though it came "ex Peerless from Bombay," did not come on the vessel of that name which was present to his mind when he made the agreement.<sup>21</sup>

The things meant by the parties must have fitted the description, or there is no mistake. If, in the case above mentioned, the buyer had meant a ship of a different name, he would have been bound by the terms of his contract. Unless the description of the subject-matter of the contract admits of more meanings than one, the party setting up mistake can only do so by showing that he meant something different from what he said, and, as we have seen, he cannot do this. Nor will a mere misnomer of the subject-matter of a contract entitle either party to avoid it if the contract itself contains such a description of its subject-matter as practically identifies it.<sup>22</sup>

*Same—Mistake as to Nature and Essential Qualities of Subject-Matter.*

A mutual mistake as to the nature or fundamental qualities of the subject-matter, so that it goes to the whole substance of the agreement, and renders the subject-matter contracted for essentially different in kind from the thing as it actually exists, may avoid the contract, but not if the mistake is not mutual. Such a mistake on the part of the buyer of an article would not alone entitle him to avoid the contract; nor would such a mistake on the part of the seller only entitle him to rescind.<sup>23</sup>

<sup>21</sup> *Raffles v. Wichelhaus*, 2 Hurl. & C. 906. And see *Gardner v. Lane*, 9 Allen (Mass.) 492; *Kyle v. Kavanagh*, 103 Mass. 356; *Thornton v. Kempster*, 5 Taunt. 786; *Cutts v. Guild*, 57 N. Y. 229; *Sheldon v. Capron*, 3 R. I. 171; *Harvey v. Harris*, 112 Mass. 32. Where on a sale of land one party thinks he is buying one tract, and the other party thinks he is selling a different tract, there is no contract. *Kyle v. Kavanagh*, supra. And see *Irwin v. Wilson*, 45 Ohio St. 426, 15 N. E. Rep. 209.

<sup>22</sup> *Ionides v. Pacific Ins. Co.*, L. R. 6 Q. B. 686; *Hazard v. New England Ins. Co.*, 1 Sumn. 218, Fed. Cas. No. 6,282.

<sup>23</sup> *Crane v. McCormick*, 92 Cal. 176, 28 Pac. Rep. 222. It is said by Sir

In a Michigan case, previous to the sale of a blooded cow, the owners and the purchaser believed that she was barren, in which case she would only be worth the small sum for which she was sold, but before she was delivered it was discovered that she was with calf, and therefore worth a large sum for breeding purposes. It was held that the mistake avoided the sale. "I know that this is a close question," it was said by the court, "and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact, such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. If there is a difference or misapprehension as to the substance of the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. The difficulty in every case is to determine whether the

Frederick Pollock: "But sometimes, even when the thing which is the subject-matter of an agreement is specifically ascertained, the agreement may be avoided by material error as to some attribute of the thing, for some attribute which the thing in truth has not may be a material part of the description by which the thing was contracted for. If this is so, the thing as it really is, namely, without that quality, is not that to which the common intention of the parties was directed, and the agreement is void. An error of this kind will not suffice to make the transaction void, unless (1) it is such that, according to the ordinary course of dealing and use of language, the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind; (2) and the error is also common to both parties." Pol. Cont. 450. See, on this point, Brant. Cont. 104-108; *Miles v. Stevens*, 3 Pa. St. 21; *Irwin v. Wilson*, 45 Ohio St. 428, 15 N. El. Rep. 209; *Wood v. Boynton*, 64 Wis. 265, 25 N. W. Rep. 42; note 25, *infra*. In an English case, the defendant had sold to the plaintiff 100 chests of tea out of a specific cargo, to be equal to a sample shown at the time of the sale, which the defendant then believed to be a part of the cargo, but which was not in fact a sample of the cargo, but of a different tea. It was held that defendant could not avoid the contract on the ground of mistake. There was no mutual mistake. *Scott v. Littledale*, 8 El. & Bl. 815.

mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.' <sup>24</sup> It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty. It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least \$750; if barren, she was worth not over \$80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them, for all purposes of use, as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for its present and ultimate use. She was not in fact the animal, or the kind of animal, the defendant intended to sell, or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell nor sale of the cow as she actually was. The thing bought and sold had in fact no existence." <sup>25</sup>

<sup>24</sup> *Kennedy v. Panama, etc., Mail Co.*, L. R. 2 Q. B. 580, 587.

<sup>25</sup> *Sherwood v. Walker*, 60 Mich. 568, 33 N. W. Rep. 919. And see *Chapman v. Cole*, 12 Gray (Mass.) 141; *Irwin v. Wilson*, 45 Ohio St. 426, 15 N. E. Rep. 209; *Bluestone Coal Co. v. Bell* (W. Va.) 18 S. E. Rep. 493; *Thwing v. Lumber Co.*, 40 Minn. 184, 41 N. W. Rep. 815; *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. Rep. 61. But see *Gardner v. Lane*, 9 Allen (Mass.) 492; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. Rep. 651.

*Same—Mistake as to Quantity.*

A mistake as to the quantity of the subject-matter may prevent any contract from being formed, or it may go only to the performance, according to its character. Since the minds of the parties to a contract must meet in one and the same intention, no contract is formed where, for instance, one of them intends to sell a certain quantity of an article, and the other intends to buy a different quantity. The acceptance in such a case varies from the terms of the offer.<sup>26</sup> So, also, where goods are sold under a mutual mistake in estimating the quantity, the sale may be rescinded;<sup>27</sup> and an agreement establishing a boundary line between lands of adjoining owners, if made under a mistake in measurement, does not bind the injured party if he promptly rescinds on discovery of the mistake.<sup>28</sup>

Where the parties have entered into a contract for the sale of a certain quantity of an article, and the seller, by mistake, delivers a greater or less quantity, the mistake goes to the performance of the contract, and does not affect its formation. The buyer in such case need not accept the quantity tendered, nor need he accept, out of the quantity sent, the quantity contracted for.<sup>29</sup> This, however, is purely a question of performance.

<sup>26</sup> *Henkel v. Pape*, L. R. 6 Exch. 7; *Pegram v. W. U. Tel. Co.*, 100 N. C. 28, 6 S. E. Rep. 770; *Pepper v. W. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. Rep. 783. These were cases in which an offer by telegraph was altered in the course of transmission, and accepted as altered. It was held that the acceptance created no contract. Some courts, however, hold the contrary, on the ground that the telegraph company, being selected by the proposer, is his agent, and that he and not the other party should suffer loss from the error. His remedy is against the telegraph company if it was negligent. See *W. U. Tel. Co. v. Shotter*, 71 Ga. 760; *Ayer v. W. U. Tel. Co.*, 79 Me. 493, 10 Atl. Rep. 495. And see *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Anheuser-Busch Brewing Ass'n v. Hutmacher*, 127 Ill. 652, 21 N. E. Rep. 626; *Howley v. Whipple*, 48 N. H. 487; *Laveland v. Green*, 40 Wis. 431; *Basons v. Brown*, 25 Kan. 410.

<sup>27</sup> *Wheadon v. Olds*, 20 Wend. (N. Y.) 174.

<sup>28</sup> *Coon v. Smith*, 29 N. Y. 392. As to mistake as to quantity of land, and relief in equity, see *Paine v. Upton*, 87 N. Y. 327; *Miller v. Craig*, 83 Ky. 623; *Newton v. Tolles* (N. H.) 19 Atl. Rep. 1092; *Pratt v. Bowman* (W. Va.) 17 S. E. Rep. 210; *Hill v. Buckley*, 17 Ves. 394.

<sup>29</sup> *Salmon v. Boykin*, 66 Md. 541, 7 Atl. Rep. 701.



What is said in the following paragraph also applies to mistake as to quantity.

*Same—Mistake as to Price.*

The principle of mistake in quantity preventing the formation of a contract is applicable to a mistake as to the price of a thing sold or hired.<sup>30</sup> "As there cannot be even the appearance of a contract when the acceptance disagrees on the face of it with the proposal, this question can arise only where there is an unqualified acceptance of an erroneously expressed or understood proposal. If the proposal is misunderstood by the acceptor, it is for him to show that the misunderstanding was reasonable. 'Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake.'"<sup>31</sup> \* \* \* If, on the other hand, the proposal is, by accident, wrongly expressed, the proposer must show that the acceptor could not reasonably have supposed it, in its actual form, to convey the proposer's real intention."<sup>32</sup> If a person snaps at an offer which he must perfectly well know to be made by mistake, he cannot enforce the contract.<sup>33</sup>

*Mistake as to Nature of Promise Known to the Other Party.*

Except as stated in the preceding paragraphs, the only form of mistake as to the quality or quantity of the thing promised, that can affect the validity of a contract, is where there is a mistake on the part of one of the parties as to the nature of the promise, and the other party knows of the mistake. It must be remembered that we are speaking here of contracts which are *prima facie* valid, and we must exclude from our consideration cases in which the offer and acceptance never agreed in terms, so that there was never the outward form of agreement, and cases in which the meaning of the terms is disputed, so that the court must determine whether the contract has, upon its true construction, been performed or

<sup>30</sup> *Rupley v. Doggett*, 74 Ill. 351; *Rovegno v. Defferari*, 40 Cal. 459.

<sup>31</sup> *Tamplin v. James*, 15 Ch. Div. 215; *McKenzie v. Hesketh*, 7 Ot. Div. 675.

<sup>32</sup> *Pol. Cont.* 449; *Webster v. Cecil*, 30 Beav. 62; *Harran v. Foley*, 62 Wis. 584, 22 N. W. Rep. 837.

<sup>33</sup> *Tamplin v. James*, 15 Ch. Div., at page 221; *Everson v. Granite Co.* (Vt.) 27 Atl. Rep. 320.

broken. Nor need we consider cases in which a promisee is unable to obtain specific performance of a promise offered in terms which are the result of a manifest inadvertence, as, for instance, where a person offers to sell an estate to another, but, by mistake in adding up the prices of the various plats, offers it for less than he meant. In such case the contract would not be enforced by a court of equity, though the promisee might, if ignorant of the mistake, recover damages.

The quality of an article bought, or the price to be paid for it, are matters as to which the statements of the parties must be taken to be conclusive against them. They must look to these matters themselves. They cannot ask courts of law to correct their errors of judgment. If it is desired that an article shall come up to a certain standard of quality, the parties can protect themselves by an express warranty. Where the buyer is unable to inspect the article purchased, the law protects him by introducing into the contract an implied warranty, which secures to him, in substance, that he shall obtain the kind of thing he bargained for, and that of a marketable quality.<sup>34</sup> Anything more than this must be a question of terms. If the buyer cannot inspect the article before purchase, he must protect himself by the terms of his bargain; if he can inspect it, he must exercise his judgment, and, if he has no confidence in his judgment, he must further seek to bind the seller by terms. A seller is not bound to depreciate his wares, even if he knows that the buyer is forming an undue estimate of their quality.

Nor is the seller affected by such impressions as the buyer may form of the nature of his promise. If the buyer thinks he is being promised a quality of article which the seller does not intend to warrant, the contract will nevertheless hold. If he wants to bind the seller as to the quality, he must make it a term of the contract. But, if the seller knows that the buyer understands his promise in a different sense from that in which he gives it, the case is altered. The contract is void, because the apparent consent indicated by the agreement of the parties to the common terms is shown to be unreal by the fact that one of the parties knew of the difference of intention between himself and the other.

<sup>34</sup> Post, p. 671.

Sir William Anson illustrates these propositions by an imaginary sale substantially as follows: (1) If a person sells another a piece of china, the buyer thinking it to be Dresden china, and the seller thinking it is not, each takes the chances as to the quality. The buyer may get a better thing than the seller intended to sell, or he may get a worse thing than he intended to buy, but in neither case is the validity of the contract affected. (2) If the buyer thinks it is Dresden china, and the seller knows that he thinks so, and knows that it is not, the contract is still binding. So long as the seller does nothing to deceive the buyer as to the quality, he is not bound to prevent him from deceiving himself.<sup>36</sup> (3) If the buyer thinks the article is Dresden china, and thinks that the seller intends to sell it as such, and the seller knows that it is not Dresden china, but does not know that the buyer thinks he intends to sell it as such, and the contract says nothing about the quality, but is merely for a sale of china in general terms, the contract is binding. The misapprehension by the buyer of the extent of the seller's promise, unknown to the seller, has no effect, for it is not the seller's fault that the buyer failed to introduce terms which he wished to form part of the contract. (4) If, on the other hand, the buyer thinks the article is Dresden china, and thinks that the seller intends to sell it as such, and the seller knows that the buyer thinks he is promising Dresden china, but does not mean to promise more than china in general terms, the contract is void. The buyer's error is not an error of judgment, but regards the intention of the seller, and the latter, knowing his intention is mistaken, allows the mistake to continue. Thus, where

<sup>36</sup> *People's Bank v. Bogart*, 81 N. Y. 101. In this case the plaintiffs had purchased from the defendant acceptances of a third person, believing that they were drawn against funds; and defendant, knowing that they were accommodation paper only, failed to disclose that fact to plaintiffs. It was held that there was no duty to disclose the fact, and that plaintiffs could not rescind. A vendee of goods is not bound to disclose to the vendor intelligence of extrinsic circumstances which might influence the price of the goods. *Laidlaw v. Organ*, 2 Wheat. 178. And see *Hadley v. Clinton Co. Imp. Co.*, 13 Ohio St. 502; *Butler's Appeal*, 26 Pa. St. 63. In most jurisdictions it is held that if the seller knows of a latent defect in his goods, and knows that the buyer supposes there is no such defect, failure to disclose it is a fraud. *Post*, p. 329.

a person was sued for refusing to accept some oats which he had agreed to buy from the plaintiff, on the ground that he had agreed and intended to buy old oats, and that those supplied were new, the jury were told that, if the plaintiff knew that the defendant "thought he was buying old oats," then he could not recover. The court of review, however, held that this was not enough to avoid the sale; that in order to do so the plaintiff must have known that the defendant "thought he was being promised old oats."<sup>27</sup> It was not knowledge of the misapprehension of the quality of the oats, but knowledge of the misapprehension of the quality promised, which would avoid the contract.<sup>28</sup>

This subject has been treated by Sir William Anson and many other writers, under "mistake," and it is regarded by some courts as a question of mistake, but most of the courts in this country regard it as a question of fraud. This may be important, for, while mistake renders a contract void, fraud, as we shall see, renders it voidable only.

#### *Mistake of Law.*

It is well settled that, as a rule, ignorance or mistake of law, by reason of which the parties do not understand the legal effect of their contract, does not avoid it, unless there is some fraud, or unless there is a relation of confidence between the parties.<sup>29</sup> In ex-

<sup>27</sup> *Smith v. Hughes*, L. R. 6 Q. B. 597. This case, in the dicta and actual decision, illustrates all of the hypotheses stated in the text. And see *Scott v. Littleddale*, 8 EL. & BL. 815; *Garrard v. Frankel*, 30 BEAV. 445.

<sup>28</sup> The rule is not limited to contracts of sale. See *Fitzmaurice v. Mosler*, 116 IND. 363, 19 N. E. REP. 180.

<sup>29</sup> *Burkhauser v. Schmitt*, 45 WIS. 316; *Fish v. Cleland*, 33 ILL. 243; *Hunt v. Rousmaniere*, 1 PET. 1; *Storrs v. Barker*, 6 JOHNS. CH. 166; *Starr v. Bennett*, 5 HILL (N. Y.) 303; *Shotwell v. Murray*, 1 JOHNS. CH. (N. Y.) 512; *Bank v. Daniel*, 12 PET. 32; *Trigg v. Read*, 5 HUMPH. (TENN.) 529; *Mellish v. Robertson*, 25 VT. 603; *Good v. Herr*, 7 WATTS & S. (PA.) 253; *Clem v. Newcastle R. Co.*, 9 IND. 488; *Russell v. Branham*, 8 BLACKF. (IND.) 277; *Rice v. Dwight Manuf'g Co.*, 2 CUSH. (MASS.) 80; *Dodge v. Essex Ins. Co.*, 12 GRAY (MASS.) 65; *Hubbard v. Martin*, 8 YERG. (TENN.) 498; *Jones v. Watkins*, 1 STEW. (ALA.) 81; *Townsend v. Cowles*, 31 ALA. 428; *People v. Supervisors*, 27 CAL. 655; *Christy v. Sullivan*, 50 CAL. 337; *Wheaton v. Wheaton*, 9 CONN. 96; *Gordere v. Downing*, 18 ILL. 492; *Rufus v. McConnell*, 17 ILL. 212; *Wood v. Price*, 46 ILL. 439; *Goltra v. Sanasack*, 53 ILL. 458; *Upton v. Tribilcock*, 91 U. S. 45; *Porter v. Jefferies* (S. C.) 18 S. E. REP. 229; *Osburn v. Throckmorton* (Va.) 18 S. E. REP.

ceptional cases the rule is sometimes disregarded, and relief granted, in courts of equity.<sup>40</sup>

In cases where the nonexistence of a right is concerned, it has been said that the mistake is not a mistake of law, so as to render the avoidance of a contract on that ground a violation of the rule that ignorance of law is no excuse. The distinction has been thus drawn in a case of mistaken rights between two senses in which the word "jus" is used with reference to that rule: "It is said, 'ignorantia juris hand excusat,' but in that maxim the word 'jus' is used in the sense of denoting general law,—the ordinary law of the country. But, when the word 'jus' is used as denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of a matter of law; but, if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."<sup>41</sup> Under this rule, the sale of a thing which, unknown to the parties, already belongs to the buyer, or does not belong to the seller, is void.<sup>42</sup> This is not a mistake of law, but of fact. The same principle is recognized in the criminal law, it being well settled that, where a person takes and appropriates the property of another under the belief that it is his own, he does not commit larceny.

Ignorance of foreign laws, including the laws of a sister state, is regarded as ignorance of fact, and not of law, since a person is not bound to acquaint himself with them.<sup>43</sup>

285; post, pp. 333, 771. But see *Underwood v. Brockman*, 4 Dana (Ky.) 309; *Flitzgerald v. Peck*, 4 Litt. (Ky.) 125; *Lowndes v. Chisholm*, 2 McCord, Eq. (S. C.) 455.

<sup>40</sup> *Benson v. Markoe*, 37 Minn. 30, 33 N. W. Rep. 38; *Griffith v. Townley*, 69 Mo. 13; *State v. Paup*, 13 Ark. 129; *Griffith v. Sebastian Co.*, 49 Ark. 24, 3 S. W. Rep. 886; *Hardigrie v. Mitchum*, 51 Ala. 151; *Kornegay v. Everett*, 99 N. C. 30, 5 S. E. Rep. 418; *Kerr v. Cooper*, 5 Del. Ch. 507.

<sup>41</sup> *Cooper v. Philbbs*, L. R. 2 H. L. 170. And see *Wilson v. Life Ins. Co.*, 60 Md. 157; *Toland v. Corey*, 6 Utah, 392, 24 Pac. Rep. 190; *Lovell v. Wall* (Fla.) 12 South. Rep. 659.

<sup>42</sup> 2 Bl. Comm. 450; *Trigg v. Read*, 5 Humph. (Tenn.) 529; *Bingham v. Bingham*, 1 Ves. Sr. 126; *Martin v. McCormick*, 8 N. Y. 331; *Outts v. Guild*, 57 N. Y. 229. Contra, *Burkhauser v. Schmitt*, 45 Wis. 316.

<sup>43</sup> *Haven v. Foster*, 9 Pick. (Mass.) 112; *Vinal v. Continental Const. & Imp.*

A mistake in drawing up a contract, or a mistake in the legal effect of a description in a deed or other writing, or in the use of technical language, is ground for relief, though in a sense it might be said to be a mistake of law rather than of fact.<sup>44</sup>

#### **SAME—EFFECT—REMEDIES.**

**159. EFFECT—Mistake**, where it has any effect, renders a contract void.

**160. REMEDIES AT LAW**—At common law the contract may be repudiated if it is executory, or, if executed in whole or in part, what has been paid under it may be recovered back.

**161. REMEDIES IN EQUITY**—In equity a suit for specific performance may be resisted; or suit may be brought to declare the contract void; or, if the mistake is merely in drawing up the contract, suit may be brought to reform the instrument.

**162. LACHES**—The contract must be rescinded, or relief must be sought in equity, within a reasonable time after knowledge of the mistake.

As we shall presently see, fraud renders a contract voidable only. The effect of mistake, however, where it has any operation at all, is to render the contract void. The common law, therefore, offers two remedies to a person who has entered into an agreement which is void on the ground of mistake. If it be still executory, he may repudiate it, and successfully defend an action brought upon it. If he has paid money under it, he may recover it back upon the general principle that "where money is paid to another under the influence of a mistake,—that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue,—an action will lie to recover it back."<sup>45</sup>

Co. (Sup.) 6 N. Y. Supp. 595; *Bank of Chillicothe v. Dodge*, 8 Barb. (N. Y.) 233.

<sup>44</sup> *Conedy v. Marcy*, 13 Gray (Mass.) 373.

<sup>45</sup> *Kelly v. Solari*, 9 Mees. & W. 54; *Wheadon v. Olds*, 20 Wend. (N. Y.) 174; post, pp. 764, 770.

In equity the victim of the mistake may resist specific performance of the contract, and may sometimes do so successfully when he might not be able to successfully defend an action at law for damages arising from its breach.<sup>46</sup> He may also sue to have the contract declared void, and to be freed from his liabilities in respect of it. If the mistake was in drawing up the contract, a suit in equity may be brought to correct the mistake, and reform the instrument so it will express the real intention of the parties.<sup>47</sup>

A party who is entitled to avoid a contract on the ground of mistake must rescind at law, or seek his relief in equity, within a reasonable time after knowledge of the mistake.<sup>48</sup>

### MISREPRESENTATION.

**163. Misrepresentation is an innocent misstatement or nondisclosure of facts. It must be distinguished from**

(a) **Fraud, which is a false representation (or nondisclosure under such circumstances that it amounts to a misrepresentation) known to be false, or made in reckless ignorance as to its truth or falsity.**

(b) **Conditions and warranties, which are representations constituting terms of the contract.**

### SAME—EFFECT.

**164. Mere misrepresentation has no effect on a contract, except in the case of contracts said to be uberrimae**

<sup>46</sup> Webster v. Cecil, 30 Beav. 62; Frisby v. Ballance, 4 Scam. (Ill.) 237; Trigg v. Read, 5 Humph. (Tenn.) 529.

<sup>47</sup> Snell v. Atlantic Ins. Co., 98 U. S. 85; Elliott v. Sackett, 106 U. S. 132, 2 Sup. Ct. Rep. 375; Beardsley v. Knight, 10 Vt. 185; Newcomer v. Kline, 11 Gill & J. (Md.) 457; Kilmer v. Smith, 77 N. Y. 226; Jenks v. Fritz, 7 Watts & S. (Pa.) 201; Fowler v. Woodward, 26 Minn. 347, 4 N. W. Rep. 231; Paine v. Upton, 87 N. Y. 327.

<sup>48</sup> Grimes v. Sanders, 93 U. S. 55; Thomas v. Bartow, 48 N. Y. 193; Sable v. Maloney, 48 Wis. 331; Dodge v. Essex Ins. Co., 12 Gray (Mass.) 71; Diman v. Providence, W. & B. R. Co., 5 R. I. 130.

fidei, in which, from their nature, or from the particular circumstances, one party must rely on the other for his knowledge of the facts, and the other is bound to the utmost good faith. These are:

- (a) Contracts of marine, fire, and life insurance.
- (b) Contracts between persons occupying a confidential relation, as between attorney and client, principal and agent, guardian and ward, trustee and cestui que trust, etc.
- (c) To a limited extent, contracts for the sale of land.
- (d) In England, and probably with us, contracts with promoters of a corporation for the purchase of shares.

165. Where misrepresentation has any effect at all, it renders the contract voidable.

166. Misrepresentation may sometimes be ground for the granting or refusing of equitable relief, where it would have no effect at all at law.

*Distinguished from Fraud.*

"Misrepresentation," as the term is here used, must be distinguished from "fraud," with which we are to deal presently. Misrepresentation means an innocent misstatement or nondisclosure of facts, while fraud consists in representations which are known to be false, or which are made in reckless ignorance of their truth or falsity, or in nondisclosure or concealment of facts under such circumstances that it amounts to a representation that the facts concealed do not exist. This will be more fully explained in treating of fraud. The practical test of fraud, as opposed to mere misrepresentation, is that fraud gives rise to an action *ex delicto*, while innocent misrepresentation does not. Fraud, besides being a vitiating element in contract, is a tort or wrong apart from contract, and may be treated as such by bringing an action of deceit. Misrepresentation, in exceptional cases, may invalidate a contract, but will not support an action of deceit.



The fraud, to give rise to such an action, need not necessarily involve a dishonest motive. It is enough if the representation is known to be false. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues, although his motives may not have been bad.<sup>49</sup> Thus, where a person accepted a bill of exchange drawn on another person, and falsely represented that he had authority from that other to do so, he was held liable in an action of deceit brought by an indorsee of the bill on its being repudiated by the drawee and dishonored, though he (the defendant) honestly believed that the acceptance would be sanctioned, and that the bill would be paid. "If the defendant," it was said, "when he wrote the acceptance, and thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority, the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence."<sup>50</sup> In this country, except in New York, and possibly a few other states,<sup>51</sup> the defendant in such case would be liable, even if he thought he had authority to accept. "If one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort."<sup>52</sup>

It is not necessary, as we have just seen, to constitute fraud for which the action of deceit will lie, as distinguished from mere misrepresentation, that there shall be a clear knowledge that the statement made is false. False statements which are intended to be acted upon, if made recklessly and with no reasonable ground of

<sup>49</sup> Per Tindal, C. J., in *Foster v. Charles*, 7 Bing. 105.

<sup>50</sup> *Polhill v. Walter*, 3 Barn. & Adol. 114.

<sup>51</sup> *White v. Madison*, 26 N. Y. 117.

<sup>52</sup> *Jefts v. York*, 10 Cush. (Mass.) 392. And see *Bartlett v. Tucker*, 104 Mass. 836; *Noyes v. Loring*, 55 Me. 408; *McCurdy v. Rogers*, 21 Wis. 199; *Johnson v. Smith*, 21 Conn. 627.

belief, constitute fraud, and not mere misrepresentation. If persons take upon themselves to make assertions as to the truth or falsity of which they are ignorant, they must, in a civil point of view, be held just as responsible if the statements are false as if they had asserted what they knew to be untrue.<sup>53</sup>

What has been said will show the distinction between fraud and mere misrepresentation. Misrepresentation may amount to fraud where the representation is not innocently made; that is, either where it is knowingly false, without regard to the honesty or dishonesty of the motive, or where it is in fact false, though not knowingly so, but was made in reckless ignorance of its truth or falsity. In either case the effect on the validity of the contract will depend on the rules in reference to fraud, which are presently to be discussed; we are here dealing with mere misrepresentation.

*Distinguished from Conditions and Warranties.*

It may be stated as a rule, subject to exception in case of certain contracts to be hereafter noticed, that innocent misrepresentation or nondisclosure of fact does not affect the validity of consent. The tendency of the courts has been to bring, if possible, every statement which is important enough to affect consent into the terms of the contract, and a representation which cannot be shown to have had so material a part in determining consent as to have formed, if not the basis of the contract, at least an integral part of its terms, is set aside altogether. If it is a part of the contract, it is no longer called a mere misrepresentation; it is a condition or warranty, and its falsity does not affect the formation of the contract, but operates to discharge the injured party from his obligation, or gives him a right of action based on the contract for loss sustained by reason of the untruth of the statement. The statement in such case is a term of the contract.

The distinctions are well shown in a leading English case. The action was brought on a charter party in which it was agreed that the plaintiff's ship, "then in the port of Amsterdam," should proceed

<sup>53</sup> Lord Cairns, in *Reese River Min. Co. v. Smith*, L. R. 4 H. L. 64; *Walsh v. Morse*, 80 Mo. 568; *Smith v. Richards*, 13 Pet. 26; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283.

to a certain port and load a cargo. At the date of the contract the ship was not in the port of Amsterdam, and did not arrive there for several days. The defendant refused to carry out the agreement, and repudiated it. The court held that the statement that the ship was in the port of Amsterdam was intended by the parties to be a condition, and a breach thereof discharged the charterer.<sup>54</sup> Williams, J., in giving judgment, thus distinguishes the various parts or terms of a contract: "Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue; nor (with the exception of the case of policies of insurance,—at all events, marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. \* \* \* Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court, and not the jury, must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. In the con-

<sup>54</sup> Behn v. Burness, 3 Best & S. 751. And see Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. Rep. 346; Lowrey v. Bangs, 2 Wall. 728; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. Rep. 12. As to the distinction in contracts of insurance, see Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Schwarzbach v. Protective Union, 25 W. Va. 655; post, p. 661.

struction of charter parties, this question has often been raised with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus, a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition,<sup>55</sup> while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement.<sup>56</sup> But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that, if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty; that is to say, a condition on the failure or nonperformance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz. a stipulation by way of agreement, for the breach of which a compensation must be sought in damages.”<sup>57</sup>

*Same—Various Senses of the Terms and Their Effect.*

It will be observed that “condition” is used in two senses,—as meaning a statement that a thing is, and a promise that a thing shall be. In either case the statement or promise is of so important a nature that the untruth of the one, or the breach of the other, discharges the contract. “Warranty” also is used in several senses. It is first made a convertible term with a condition. It is then used “in the narrower sense of the word,” in which sense it means (1) a subsidiary promise in the contract, the breach of which could under no circumstances do more than give rise to an action for damages, and (2) a condition, the breach of which might have discharged the

<sup>55</sup> *Glaholm v. Hays*, 2 Man. & G. 257.

<sup>56</sup> *Seeger v. Duthie*, 8 C. B. (N. S.) 45; *Tarrabochia v. Hickie*, 1 Hurl. & N. 133.

<sup>57</sup> *Behn v. Burness*, 3 Best & S. 751.

contract had it not been so far acquiesced in as to lose its effect for that purpose, though it may give rise to an action for damages.

The various senses of the terms we have been discussing, and their effect, may be summed up as follows: (1) "Representations," not fraudulent, made at the time of entering into the contract, but not forming a part of it, may affect its validity in certain special cases, but are otherwise inoperative. When they do operate, their falsehood vitiates the formation of the contract and makes it voidable. (2) "Conditions" are either statements or promises which form the basis of the contract. Whether or not a term in the contract amounts to a condition must be a question of construction, to be answered by ascertaining the intention of the parties from the wording of the contract and the circumstances under which it was made. But when a term in the contract is ascertained to be a condition, then, whether it be a statement or a promise, the untruth or the breach of it will entitle the party to whom it is made to be discharged from his liabilities under the contract. (3) "Warranties," used in "the narrower sense," are independent subsidiary promises, the breach of which does not discharge the contract, but gives to the injured party a right of action for such damage as he has sustained by the failure of the other to fulfill his promise. (4) A condition may be broken, and the injured party may not avail himself of his right to be discharged, but continue to take benefit under the contract, or, at any rate, to act as though it were still in operation. In such a case the condition sinks to the level of a warranty, and the breach of it, being waived as a discharge, can only give a right of action for the damage sustained.<sup>55</sup> This is sometimes called a "warranty *ex post facto*."

In an English case arising out of a sale of hops by the plaintiff to the defendant it appeared that, before commencing to deal, the defendant asked the plaintiff if any sulphur had been used in the treatment of that year's crop. The plaintiff said, "No." The defendant said that he would not even ask the price if any sulphur had been used. After this the parties discussed the price, and the defendant agreed to purchase the crop of that year. He afterwards repudiated the contract on the ground that sulphur had been used, and the plaintiff sued for the price. It was shown that the plaintiff had used

<sup>55</sup> *Avery v. Willson*, 81 N. Y. 341; post, p. 676.

sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made by the plaintiff as to the use of sulphur was not willfully false, and they further found that "the affirmation that no sulphur had been used was intended by the parties to be a part of the contract of sale, and a warranty by the plaintiff." The court had to consider the effect of this finding, and came to the conclusion that the representation of the plaintiff was a part of the contract, and a preliminary condition, the breach of which entitled the defendant to be discharged from liability. Erle, C. J., said: "We avoid the term 'warranty' because it is used in two senses, and the term 'condition' because the question is whether that term is applicable. Then the effect is that the defendants required, and that the plaintiff gave, his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted, and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used; and upon this ground we agree that the rule should be discharged." <sup>50</sup>

*Conclusion as to Effect of Misrepresentation.*

From what has been shown, we may state the rule as to misrepresentations in this way: Whenever the validity of a contract is called in question, or the liabilities of the parties are said to be affected, by reason of representations made before or at the time of entering into the contract, the effect of the representation will depend on the answers to the following questions: (1) Were the

<sup>50</sup> *Bannerman v. White*, 10 C. B. (N. S.) 860.

statements in question a part of the terms of the contract? (2) If not, were they made fraudulently? (3) If neither of these, was the contract one of that class of contracts called "contracts uberrimae fidei," in which one of the parties had to rely peculiarly on the other for his knowledge of material facts, and the other was bound to the most perfect good faith? If all of these questions are answered in the negative, the representation has no effect at all.

*Excepted Contracts Affected by Mere Misrepresentation.*

To the general rule that misrepresentations not amounting to fraud, and not forming a term of the contract, do not affect its validity, there are exceptions in case of certain special contracts sometimes said to be *uberrimae fidei*; that is, contracts of such a character that one of the parties must rely on the other for his knowledge of the facts. As the term implies, the most perfect good faith is required in such cases, and any material misstatement or concealment of facts, even though innocent, will avoid the contract.

*Same—Contracts of Insurance.*

Among these excepted contracts are contracts of insurance. In England it seems that the exception applies only to marine, and, though to a less extent, to fire, insurance; but with us it extends also to life insurance. In the case of a contract of marine insurance the assured is bound to give the insurer all such information as would be likely to affect his judgment in accepting the risk, and misrepresentation or nondisclosure of any such matter, though perfectly innocent, will vitiate the policy.<sup>66</sup> As said by the Ohio court, in speaking of marine insurance, and after speaking of warranties: "The assured is bound to communicate every material fact within his knowledge not known, or presumed to be known, to the underwriter, whether inquired for or not; and a failure in either particular, although it might have arisen from mistake, accident, or forgetfulness, is attended with the rigorous consequence that the policy

<sup>66</sup> *McLanahan v. Universal Ins. Co.*, 1 Pet. 170; *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508; *Ely v. Hallett*, 2 Caines (N. Y.) 57; *Union Ins. Co. v. Stoney*, 1 Harp. (S. C.) 235; *Lexington Ins. Co. v. Paver*, 16 Ohio, 324; *Vale v. Phoenix Ins. Co.*, 1 Wash. C. C. 283, Fed. Cas. No. 16,811; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136; *Neptune Ins. Co. v. Robinson*, 11 Gill & J. (Md.) 256; *Augusta Ins. Co. v. Abbott*, 12 Md. 348.

never attaches, and is void, for the reason that the risk assumed is not the one intended to be assumed by the parties."<sup>61</sup> Thus, a policy of marine insurance has been avoided because the goods were insured for an amount considerably in excess of their value, though the fact of overvaluation did not affect the risks of the voyage, simply because the valuation is a fact usually taken into consideration by underwriters.<sup>62</sup>

It is said that the doctrine applicable to marine insurance does not apply, to the full extent, to other contracts of insurance. "In other contracts," it has been said, "it is enough that warranties even are substantially performed; and they cannot, in general, be impeached for misrepresentation or concealment unless fraud was intended. Fire insurance sprung up at a later period, and the courts, finding a system of rules already constructed for marine risks, at once transferred them to this new species of insurance. Almost all the diversity of opinion to be found in the later cases has resulted from a growing conviction with most courts that a substantial difference exists in the nature and essential elements of the contract of marine and fire insurance, which renders some of these rules inapplicable to the latter, and from a disinclination with others to depart from the strict rules applied to marine insurance."<sup>63</sup> It is difficult to say to what extent the doctrine in the case of marine insurance applies to fire insurance. It is settled, however, that any false representation of a material fact, however innocently made, will avoid the policy.<sup>64</sup> It has even been held that the innocent nondisclosure of a material fact will vitiate the policy. Where, for instance, one fire insurance company reinsured a risk in another company without informing the latter that it had heard that the assured, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured, it was held that such nondisclosure, though unintentional,

<sup>61</sup> *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, at page 462.

<sup>62</sup> *Ionides v. Pender*, L. R. 9 Q. B. 537.

<sup>63</sup> *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St., at page 463. And see *Burritt v. Saratoga Ins. Co.*, 5 Hill (N. Y.) 188; *Wineland v. Security Ins. Co.*, 53 Md. 276; *U. S. Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224.

<sup>64</sup> *Armour v. Transatlantic Ins. Co.*, 90 N. Y. 450.



vitiates the contract of reinsurance.<sup>65</sup> Where, however, as is now generally the practice, written applications for insurance are required, in which specific questions are asked and answered, an innocent failure to disclose facts about which no inquiry is made will not avoid the policy, though it is otherwise where there is an innocent failure to disclose a fact where inquiry is made.<sup>66</sup>

In England and in some of our states a distinction has been drawn between life insurance and marine and fire insurance, and life insurance has been said not to be within the exception to the rule that innocent misrepresentation does not avoid a contract.<sup>67</sup> In most of our states, however, no distinction is made in this respect between life and fire insurance.<sup>68</sup>

Even in England the tendency of the modern adjudications is towards applying the doctrine that innocent misrepresentation, including nondisclosure, vitiates a contract of fire or life, as well as marine, insurance, without any practical distinction. As said in an English case: "Whether a policy be effected on a life, or a ship, or against fire, the underwriter has a right to expect that everything material should be communicated to him."<sup>69</sup>

<sup>65</sup> *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359. And see *Walden v. Louisiana Ins. Co.*, 12 La. Ann. 134; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 673; *Bobbitt v. Liverpool, L. & G. Ins. Co.*, 66 N. C. 70.

<sup>66</sup> *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402; *Com. v. Hide & Leather Ins. Co.*, 112 Mass. 136; *Washington Mills Manuf'g Co. v. Weymouth Ins. Co.*, 135 Mass. 505; *Burritt v. Saratoga Ins. Co.*, 5 Hill (N. Y.) 188; *Browning v. Home Ins. Co.*, 71 N. Y. 508; *North American Ins. Co. v. Throop*, 22 Mich. 146; *Clark v. Manufacturers' Ins. Co.*, 8 How. 249; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 186; *Short v. Home Ins. Co.*, 90 N. Y. 16.

<sup>67</sup> *Whulton v. Hardesty*, 8 El. & Bl., at page 299; *Schwarzbach v. Protective Union*, 25 W. Va. 655; *Moulou v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 463.

<sup>68</sup> *Bliss, Ins.* 75; *Vose v. Eagle Life & H. Ins. Co.*, 6 Cush. (Mass.) 42; *Campbell v. New England Ins. Co.*, 98 Mass. 381, at page 396; *Goucher v. Northwestern Traveling Men's Ass'n*, 20 Fed. Rep. 596; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837; *Mutual Ben. Life Ins. Co. v. Wise*, 34 Md. 582; *Aetna Life Ins. Co. v. France*, 91 U. S. 512.

<sup>69</sup> *Lindman v. Desborough*, 3 Car. & P. 353; *London Assurance v. Mansel*, 41 Law T. (N. S.) 225.

*Same—Contracts for the Sale of Land.*

It is said by Sir William Anson that contracts for the sale of land are *uberrimae fidei*, and therefore within the exception to the rule that innocent misrepresentation does not affect the validity of the contract; but this is so only to a very limited extent, even in England,<sup>70</sup> and probably to a less extent in this country. As a rule, the courts of law with us recognize no distinction in this respect between contracts for the sale of land and other contracts.<sup>71</sup> A purchaser of land, it has been held, is not bound to disclose facts within his knowledge which render the land worth much more than the price he offers; as, for instance, the fact that there is a valuable mine under it.<sup>72</sup> It has, however, been held that a misdescription of the land, or of the title, or of the terms to which it is subject, though made without any fraudulent intention, will avoid the contract.<sup>73</sup> Courts of equity have granted or refused their peculiar remedies in the case of contracts for the sale of land because of innocent misrepresentation,<sup>74</sup> but this has been because of principles peculiar to equity, and not because of the nature of the contract. The same principles have been applied, and the same relief granted or refused, in the case of other contracts.

*Same—Contracts to Purchase Shares in Companies.*

Another exception is in the case of contracts with the promoters of a corporation for the purchase of shares. It is said in an English case: "Those who issue a prospectus holding out to the public

<sup>70</sup> 2 Add. Cont. § 533; 1 Sugd. Vend. 8.

<sup>71</sup> *Livingston v. Peru Iron Co.*, 2 Paige, Ch. (N. Y.) 392; *Williams v. Spurr*, 24 Mich. 335.

<sup>72</sup> Note 90, *infra*.

<sup>73</sup> *Flight v. Booth*, 1 Bing. N. C. 370; *Jones v. Edney*, 3 Camp. 285; *Rayner v. Wilson*, 43 Md. 144; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. Rep. 800; *Munroe v. Pritchett*, 16 Ala. 785; *Rimer v. Dugan*, 39 Miss. 477; *Tyson v. Passmore*, 2 Pa. St. 122; *Keating v. Price*, 58 Md. 532, at page 536; *Günby v. Slater*, 44 Md. 237; *Foley v. Crow*, 37 Md. 51; *Mitchell v. McDougall*, 62 Ill. 498; *Boughman v. Gould*, 45 Mich. 481, 8 N. W. Rep. 73; *Smith v. Richards*, 13 Pet. 26; *Mulvey v. King*, 39 Ohio St. 491.

<sup>74</sup> *Price v. McCauley*, 19 Eng. Law & Eq. 162; *O'Rourke v. Percival*, 2 Ball & B. 58; *Brooks v. Hamilton*, 15 Minn. 26 (Gil. 10); *Mohler v. Carder*, 73 Iowa, 582, 35 N. W. Rep. 647; *Watson v. Baker*, 71 Tex. 739, 9 S. W. Rep. 867.

the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."<sup>75</sup> As said in a New York case, the promoters of a corporation occupy before its organization a position of trust and confidence towards those whom they seek to induce to invest in the enterprise.<sup>76</sup>

*Same—Confidential Relations in General.*

All contracts, whatever may be the subject-matter, are *uberrimae fidei*, where the parties occupy a confidential relation towards each other, as in the case of contracts between an attorney and his client, a principal and his agent, a trustee and his cestui que trust, a guardian and his ward, a parent and his child, etc. The parties in such a case do not stand on equal ground; one of them reposes confidence in the other, and the latter, in dealing with the former, is held to the utmost good faith, and can gain no advantage by his dealings. Any misrepresentation or nondisclosure of material facts will vitiate a contract between them.<sup>77</sup> All the exceptions to the rule that innocent misrepresentation does not avoid a contract are based on the fact that a relation of confidence exists between the parties.

Speaking of the duty to disclose facts, Pomeroy says: "All the instances in which the duty exists \* \* \* may be reduced to three classes. These three classes are, in general, clearly distinct

<sup>75</sup> *New Brunswick & C. R. Co. v. Muggeridge*, 1 Drew. & S. 381. And see *Venezuela R. Co. v. Kisch*, L. R. 2 H. L. 113; *Peek v. Gurney*, L. R. 6 H. L. 403.

<sup>76</sup> *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. Rep. 505.

<sup>77</sup> *Brooks v. Martin*, 2 Wall. 70, at page 84; *Baker v. Humphrey*, 101 U. S. 494, at page 502; *James v. Steere*, 16 R. I. 367, 16 Atl. Rep. 143; *Smith v. Davis*, 49 Md. 470; *McConkey v. Cockey*, 69 Md. 286, 14 Atl. Rep. 465; *Reed v. Peterson*, 91 Ill. 288; *Ward v. Armstrong*, 84 Ill. 151; *Zeigler v. Hughes*, 55 Ill. 288; *Norris v. Tayloe*, 49 Ill. 17; *Casey v. Casey*, 14 Ill. 112; note 225. *infra*.

and separate, although their boundaries may sometimes overlap, or a case may fall within two of them. (1) The first class includes all those instances in which, wholly independent of the form, nature, or object of the contract or other transaction, there is a previous, existing, definite fiduciary relation between the parties; so that the obligation of perfect good faith and of complete disclosure always arises from the existing relations of trust and confidence, and is necessarily impressed upon any transaction which takes place between such persons. Familiar examples are contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like. (2) The second class embraces those instances in which there is no existing special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary, but it appears that either one or each of the parties, in entering into the contract or other transaction, expressly reposes a trust and confidence in the other, or else, from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied. The nature of the transaction is not the test in this class. Each case must depend upon its own circumstances. The trust and confidence, and the consequent duty to disclose, may expressly appear by the very language of the parties, or they may be necessarily implied from their acts and other circumstances. (3) The third class includes those instances where there is no existing fiduciary relation between the parties, and no special confidence reposed is expressed by their words, or implied from their acts, but the very contract or other transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties. The contract of insurance is a familiar example."<sup>18</sup>

*Same—Contracts of Suretyship.*

The contract of suretyship has sometimes been treated as being within this excepted class of contracts, but as regards the formation of the contract it is not really so. To vitiate such a contract

<sup>18</sup> 2 Pom. Eq. Jur. § 902.

the misrepresentation or nondisclosure must amount to fraud; but we shall see, in treating of fraud, that nondisclosure of facts which there is a duty to disclose is sometimes regarded as fraud, without regard to the question of motive or design.<sup>79</sup> Where the contract of suretyship has once been formed, the surety is entitled to be informed of any agreement between the creditor and the debtor which alters their relations, or any circumstance which would give him a right to avoid the contract.<sup>80</sup> Failure of the creditor to give such information does not affect the formation of the contract, but merely discharges the surety from any further liability, and therefore the question has nothing to do with our present discussion.

*Effect in Equity.*

This rule as to the effect of misrepresentations is not adhered to in courts of equity. A false statement made by one of the parties to the other has been held sufficient ground for refusing specific performance of the contract, though there was no fraud, and the statement was not a term in the contract;<sup>81</sup> and a false representation believed to be true at the time it was made, and which was no part of the contract, has been held sufficient ground for setting the contract aside.<sup>82</sup> In some cases it seems to have been held that a court of equity will not assume jurisdiction to set a contract aside because there was an innocent misrepresentation, where the con-

<sup>79</sup> *North British Ins. Co. v. Lloyd*, 10 Exch. 523; *Atlas Bank v. Brownell*, 9 R. I. 168; *Hamilton v. Watson*, 12 Clark & F. 109; *Guardian Fire & Assur. Co. v. Thompson*, 68 Cal. 208, 9 Pac. Rep. 1; post, p. 326.

<sup>80</sup> *Phillips v. Foxall*, L. R. 7 Q. B. 606; *Roberts v. Donovan*, 70 Cal. 108, 11 Pac. Rep. 599; *Evans v. Kneeland*, 9 Ala. 42. But see *Atlantic & P. Tel. Co. v. Barnes*, 64 N. Y. 385; *Jones v. U. S.*, 18 Wall. 662.

<sup>81</sup> *Le Mare v. Dixon*, L. R. 6 H. L. 414, at page 428.

<sup>82</sup> *Traill v. Baring*, 4 De Gex, J. & S. 318, 33 L. J. Ch. 521; *Redgrave v. Hurd*, 20 Ch. Div. 13; *Brooks v. Hamilton*, 15 Minn. 26 (Gil. 10); *Smith v. Richards*, 13 Pet. 26, at page 36; *Cowley v. Smyth*, 46 N. J. Law, 380; *Florida v. Morrison*, 44 Mo. App. 529; *Alker v. Alker*, 12 N. Y. Supp. 676; *Joice v. Taylor*, 6 Gill & J. (Md.) 54; *Taymon v. Mitchell*, 1 Md. Ch. 497; *Kent v. Carcaud*, 17 Md. 290; *Keating v. Price*, 58 Md. 532; *Thompson v. Lee*, 31 Ala. 292; *Converse v. Blumrich*, 14 Mich. 109; *Wilcox v. University*, 32 Iowa, 367; *Allen v. Hart*, 72 Ill. 104; *Twitchell v. Bridge*, 42 Vt. 68; *Trengel v. Miller*, 37 Ind. 1; *Bankhead v. Alloway*, 6 Cold. (Tenn.) 56; *Foords v. McComb*, 12 Bush (Ky.) 723. But see *Tone v. Wilson*, 81 Ill. 529.

tract is cognizable at law, and there is no other ground for equitable jurisdiction.<sup>83</sup>

*Same—Equitable Estoppel.*

A representation by a party to a contract, relied upon by the other, may, in equity, create an estoppel against him. This is variously termed an "estoppel by conduct," or an "estoppel in pais," or an "equitable estoppel." Thus, in a suit based on a promise to make a provision by will in consideration of marriage, the chancellor, while admitting that the transaction amounted to a contract, based his decision on "this larger principle: that where a man makes a representation to another, in consequence of which that other alters his position, or is induced to do any other act which is either permitted or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively."<sup>84</sup>

*What Amounts to a Representation.*

In speaking of representations in entering into contracts of insurance, Mr. Justice Story said: "To constitute a representation, there should be an explicit affirmation or denial of a fact,—of such an allegation as would irresistibly lead the mind to the same conclusion. If the expressions are ambiguous, or such as the parties might fairly use without intending to authorize a particular conclusion, the assured ought not to be bound by the conjectures, or calculations of probability, of the underwriter."<sup>85</sup>

A mere statement or expression of opinion or statement of intention will not amount to a representation, the falsity of which will avoid a contract.<sup>86</sup> Thus, in a contract of marine insurance,

<sup>83</sup> *Groff v. Rohrer*, 35 Md. 327.

<sup>84</sup> *Coverdale v. Eastwood*, L. R. 15 Eq. 121; *Brown v. Wheeler*, 17 Conn. 345; *Thrall v. Thrall*, 60 Wis. 503, 19 N. W. Rep. 333; *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Com. v. Moltz*, 10 Pa. St. 527; *Cowles v. Bacon*, 21 Conn. 451; *Scudder v. Carter*, 43 Ill. App. 252.

<sup>85</sup> *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506, at page 541.

<sup>86</sup> *Dowdall v. Cannaday*, 32 Ill. App. 207; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Rice v. New England Ins. Co.*, 4 Pick. (Mass.) 439; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136; *Fosdick v. Norwich Marine Ins. Co.*, 3 Day (Conn.) 108; *Dennison v. Thomaston Ins. Co.*, 20 Me. 125; *Connecticut Ins. Co. v. Lucha*, 108 U. S. 498, 2 Sup. Ct. Rep. 949.

the assured communicated to the insurer a letter from the master of his vessel, stating that, in his opinion, the anchorage of the place to which the vessel was bound was safe. The vessel was lost there, but the court held that the assured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the expressions contained in the letter were not a representation of fact, but an opinion which the insurers could act upon or not, as they pleased.<sup>87</sup> Nor are commendatory expressions, such as men habitually use in order to induce others to enter into a bargain, regarded as representations of fact.<sup>88</sup> The misrepresentation, to be effective at all in avoidance of the contract, must have been relied upon by the other party, and have induced him to enter into the contract, or, rather, it must have been one of the inducements.<sup>89</sup> This will be more fully considered in treating of fraud.

#### FRAUD.

167. Fraud is a false representation of a material fact, or nondisclosure of a material fact under such circumstances that it amounts to a false representation, made with knowledge of its falsity, or in reckless disregard of whether it is true or false, or as of personal knowledge, with the intention that it shall be acted upon by the other party, and which is acted upon by him to his injury. In detail:

- (a) There must, as a rule, be a false representation, and not a mere nondisclosure; but nondisclosure or concealment is equivalent to a false representation—

<sup>87</sup> *Anderson v. Pacific Ins. Co.*, L. R. 7 C. P. 65.

<sup>88</sup> A statement by an auctioneer that land which he offered for sale was "very fertile and improvable," whereas, in fact, it was in part abandoned as useless, was held to be "a mere flourishing description by an auctioneer," and not such a representation as would avoid the sale. *Dimmock v. Hallett*, L. R. 2 Ch. 21, 27. But on the sale of an hotel it was held that the contract was avoided by a false statement that the present lessee was "a most desirable tenant." *Smith v. Land & House Property Co.*, 28 Ch. Div. 7. And see *Tuck v. Downing*, 76 Ill. 71. See, also, post, p. 334.

<sup>89</sup> *Tuck v. Downing*, 76 Ill. 71; *Fauntleroy v. Willcox*, 80 Ill. 477; *Slaughter v. Gerson*, 13 Wall. 379; post, p. 344.

- (1) Where active steps are taken to prevent discovery of the truth.
  - (2) Where, though the representation made is true as far as it goes, the suppression of facts renders it in fact untrue.
  - (3) Where, under the circumstances, there is a duty to disclose the facts suppressed, so that failure to disclose them is an implied representation that they do not exist.
- (b) The representation must be of a past or existing fact; and therefore fraud cannot result from—
- (1) Expressions of opinion, belief, or expectation.
  - (2) Promises or expressions of intention. A representation, however, that a certain intention exists, when it does not exist, is a false representation of an existing fact.
  - (3) Representations as to the law. Equity, however, will sometimes grant relief.
- (c) The representation must be of a material fact.
- (d) The representation must be of such a character, or must be made under such circumstances, that the other party has a right to rely on it. Fraud, therefore, as a rule, cannot be predicated upon—
- (1) Commendatory expressions as to value, prospects, and the like.
  - (2) False representations in cases where there is no actual fraud, and the parties deal upon an equal footing, and with equal means of knowledge.
- (e) The representation must be made with knowledge of its falsity. It is regarded as “knowingly” false—
- (1) If actually known to be false.
  - (2) If made in reckless disregard of whether it is true or false.



- (3) If the fact is susceptible of knowledge, and the representation is made as of the party's personal knowledge.
- (f) The representation need not be made directly to the other party, but it must be intended to reach him, and to be acted upon by him.
- (g) The representation must deceive; that is, it must be relied upon by the other party, and must induce him to act.
- (h) It must result in injury.

It has been said by Anson that misrepresentation, as distinguished from fraud, is an innocent false representation of facts, or a nondisclosure of facts, whether innocent or not, and that fraud, therefore, differs from misrepresentation, not only in the fact that the representation is not innocently false, but in the further fact that there must, as a rule, be a representation; but this is not strictly true with us. It is true, however, that, subject to exceptions to be presently explained, a mere nondisclosure of fact, without more, is not fraud, whatever the intention may be. There must be some active attempt to deceive, either by a statement which is false, or by a representation, true as far as it goes, but accompanied with such a suppression of facts as to make it convey a false impression, or else there must be a fraudulent concealment of facts which the party is under a duty to disclose.

Mere silence or nondisclosure of facts may be such a misrepresentation as will avoid a contract *uberrimae fidei*, but otherwise it generally has no effect, whatever may be the intention in failing to make the disclosure. Nondisclosure, even with intent to deceive, does not amount to a fraud which will render a contract voidable, or sustain an action for deceit, unless there is active concealment or a suppression of facts which there is a duty to disclose.<sup>99</sup> For in-

<sup>99</sup> *Peek v. Gurney*, L. R. 6 H. L. 403; *Dambmann v. Schulting*, 75 N. Y. 55; *People's Bank v. Bogart*, 81 N. Y. 103; *Butler's Appeal*, 26 Pa. St. 63; *Hadley v. Clinton Imp. Co.*, 13 Ohio St. 502; *Rison v. Newberry* (Va.) 18 S. E. Rep. 916; *Laidlaw v. Organ*, 2 Wheat. 178; *Smith v. Beatty*, 2 Ired. Eq. (N. C.) 456; *Harris v. Tyson*, 24 Pa. St. 347; *Williams v. Spurr*, 24 Mich. 335; *Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl. Rep. 426; *Cleaveland v. Richardson*, 132

stance, in an English case, where the defendant had let to the plaintiff a house which he knew was required for immediate occupation, without disclosing that it was in a ruinous condition and unfit for habitation, it was held that an action for fraud would not lie. "It is not pretended," it was said, "that there was any warranty, express or implied, that the house was fit for immediate occupation; but it is said that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit."<sup>1</sup> In this case the condition of the premises was easily ascertainable by the plaintiff if he had only chosen to look at them. There were no circumstances imposing any duty on defendant to disclose their condition, and he made no statements to induce the plaintiff to forego an investigation.

The fact that the purchaser of goods fails to disclose the fact that he is insolvent does not amount to fraud if he intends to pay for them, and is not asked as to his financial condition.<sup>2</sup> If, however, at the time of the purchase, he does not intend to pay, he is guilty of

U. S. 318, 10 Sup. Ct. Rep. 100; *Cochrane v. Halsey*, 25 Minn. 52; *West v. Anderson*, 9 Conn. 107; *Juzan v. Toulmin*, 9 Ala. 662; *Coddington v. Goddard*, 82 Mass. 463. Failure of the purchaser of land to disclose to the vendor the fact that there is mineral under it does not amount to fraud. *Harris v. Tyson*, supra; *Butler's Appeal*, supra; *Smith v. Beatty*, supra. See, also, as to concealment by purchaser, *Neill v. Shamburg*, 158 Pa. St. 263, 27 Atl. Rep. 992; ante, p. 322, note 79.

<sup>1</sup> *Keates v. Lord Cadogan*, 10 C. B. 591; *Fisher v. Lighthall*, 4 Mackey (D. C.) 82; *Lucas v. Coulter*, 104 Ind. 81, 3 N. E. Rep. 622; *Foster v. Peyser*, 9 Cush. (Mass.) 242.

<sup>2</sup> *Talcott v. Henderson*, 31 Ohio St. 162; *Powell v. Bradley*, 9 Gill & J. (Md.) 220; *Morrill v. Blackman*, 42 Conn. 324; *Zucker v. Carpeles*, 88 Mich. 413, 50 N. W. Rep. 373; *Hotchkin v. Bank* (N. Y. App.) 27 N. E. Rep. 1050; *Le Grand v. Bank*, 81 Ala. 123, 1 South. Rep. 460; *Nichols v. Pinner*, 18 N. Y. 295; *Morris v. Talcott*, 96 N. Y. 100; *Reticker v. Katzenstein*, 26 Ill. App. 33; *Swarthout v. Merchant*, 47 Hun (N. Y.) 106; *Bidault v. Wales*, 20 Mo. 546; *Wilson v. White*, 80 N. C. 280.

fraud, for he impliedly represents that he does intend to pay;<sup>83</sup> and it has been held by a number of courts that, if he has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay.<sup>84</sup> If he is questioned as to his financial condition, he must disclose the truth. If, for instance, he states his assets correctly, but does not disclose all his liabilities, he commits a fraud.<sup>85</sup>

To the rule that nondisclosure of facts is not fraud, there are other exceptions than those mentioned, some of them only apparent, others more or less real. Active efforts to conceal a fact—as, for instance, where obstacles are thrown in the way to prevent the other party's inquiries from resulting in its discovery, or his attention is diverted for such a purpose—are equivalent to a false representation.<sup>86</sup> So,

<sup>83</sup> *Talcott v. Henderson*, *supra*; *Stewart v. Emerson*, 52 N. H. 301; *Donaldson v. Farwell*, 93 U. S. 633; *Ex parte Whittaker*, 10 Ch. App. 446; *Burrill v. Stevens*, 73 Me. 395; *Belding v. Frankland*, 8 Lea (Tenn.) 67; *Harris v. Alcock*, 10 Gill & J. (Md.) 226; *Wilmot v. Lyon*, 49 Ohio St. 296, 34 N. E. Rep. 720; *Nichols v. McMichael*, 23 N. Y. 266; *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. Rep. 875; *Brower v. Goodyear*, 88 Ind. 572; *Ross v. Miner*, 64 Mich. 204, 31 N. W. Rep. 185, 35 N. W. Rep. 60; *Ayres v. French*, 41 Conn. 142; *Jaffrey v. Brown*, 29 Fed. Rep. 476; *Jordan v. Osgood*, 109 Mass. 457; *Dow v. Sanborn*, 3 Allen (Mass.) 181; *Thompson v. Rose*, 16 Conn. 71; *Yeager Milling Co. v. Lawler*, 39 La. Ann. 572, 2 South. Rep. 398; *Allen v. Hartfield*, 76 Ill. 358; *Devoe v. Brandt*, 53 N. Y. 462; *Henequin v. Naylor*, 24 N. Y. 139; *Curnahan v. Bailey*, 28 Fed. Rep. 519; *Feckheimer v. Baum*, 37 Fed. Rep. 167; *Shipman v. Seymour*, 40 Mich. 274; *Wright v. Brown*, 67 N. Y. 1; *Bidault v. Wales*, 20 Mo. 546; *De Farges v. Pugh*, 93 N. C. 31. There are a few decisions to the contrary. *Smith v. Smith*, 21 Pa. St. 367; *Bell v. Ellis*, 33 Cal. 620.

<sup>84</sup> *Talcott v. Henderson*, *supra*; *Jaffrey v. Brown*, 29 Fed. Rep. 476; *Elsass v. Harrington*, 28 Mo. App. 300; *Whittin v. Fitzwater*, 129 N. Y. 626, 29 N. E. Rep. 298; *Dalton v. Thurston*, 15 R. I. 418, 7 Atl. Rep. 112; *Bach v. Tuch*, 10 N. Y. Supp. 884. But see, *contra*, *Com. v. Eastman*, 1 Cush. (Mass.) 189; *Biggs v. Barry*, 2 Curt. 259, Fed. Cas. No. 1,402; *Burrill v. Stevens*, 73 Me. 395. It has even been held that the fact of insolvency and concealment is sufficient to take the case to the jury on the question of intention not to pay. *Edson v. Hudson*, 83 Mich. 450, 47 N. W. Rep. 347; *Slagle v. Goodnow*, 45 Minn. 531, 48 N. W. Rep. 402.

<sup>85</sup> *Newell v. Randall*, 32 Minn. 171, 19 N. W. Rep. 972; *Childs v. Merrill*, 63 Vt. 463, 22 Atl. Rep. 626. See, also, *post*, p. 333.

<sup>86</sup> *Croyle v. Moses*, 90 Pa. St. 250; *Matthews v. Bliss*, 22 Pick. (Mass.) 48; *Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. Rep. 623; *Kenner v. Harding*, 85 Ill. 265; *Kohl v. Lindely*, 39 Ill. 195, 201; *Cogel v. Knisely*, 89 Ill. 598, 601;

also, if a person makes a representation as to facts which is true as far as it goes, but intentionally suppresses other facts so as to make the representation convey a false impression, this is a false representation, and not a mere nondisclosure. The concealment or withholding of that which is not stated makes that which is stated absolutely false."<sup>7</sup>

Most other exceptions lie in a distinction made by the courts between mere silence where there is no duty to speak, and concealment of facts which are peculiarly within the knowledge of the party concealing them, and which in good faith he is bound to disclose. "In an action of deceit," it has been said by the supreme court of the United States, "it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment. '*Aliud est tacere, aliud celare*,'—a suppression of the truth may amount to a suggestion of falsehood. And if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of, and equivalent to, a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." <sup>88</sup>

*Roseman v. Conovan*, 43 Cal. 110. Turning an article to conceal defect. *Udell v. Atherton*, 7 Hurl. & N. 172.

<sup>87</sup> *Mallory v. Leach*, 35 Vt. 156; *Hadley v. Clinton Imp. Co.*, 18 Ohio St. 502; *Cole v. Kennedy*, 81 Iowa, 300, 46 N. W. Rep. 1088; *Kidney v. Stoddard*, 7 Metc. (Mass.) 252. "In order to establish a case of false representation, it is not necessary that something which is false should have been stated as if it was true. If the presentation of that which is true creates an impression which is false, it is, as to him who, seeing the misapprehension, seeks to profit by it, a case of false representation." *Lomerson v. Johnston*, 47 N. J. Eq. 312, 20 Atl. Rep. 675. And see *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. Rep. 940; *Howard v. Gould*, 28 Vt. 523.

<sup>88</sup> *Stewart v. Wyoming Cattle-Ranch Co.*, 128 U. S. 383, 9 Sup. Ct. 101. And see *Laidlaw v. Organ*, 2 Wheat. 178; *Smith v. Countryman*, 30 N. Y. 655; *Griell v. Lomax* (Ala.) 6 South. Rep. 741; *Loewer v. Harris*, 6 C. C. A. 394, 57

The owner of land perpetrates a fraud if he sells it without disclosing a defect in his title, or other defects, peculiarly within his knowledge, and not equally within the knowledge or reach of the purchaser;" and, "in contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own, and, if it proves otherwise, an action on the case lies against him to exact damages for this deceit."<sup>100</sup> If a person sells a chattel with a patent defect in it, and the buyer has an opportunity of inspecting it, the seller does not commit a fraud by not pointing out the defect; but it is a fraud, as well as a breach of implied warranty, for a person to sell personal property without disclosing the existence of a material latent defect which is known to him,<sup>101</sup> or for the holder of commercial paper, in negotiating it.

Fed. Rep. 368; *George v. Johnson*, 6 Humph. (Tenn.) 36; *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125; *Peebles v. Stephens*, 3 Bibb (Ky.) 324; *Waters v. Mattingley*, 1 Bibb (Ky.) 244; *Fish v. Cleland*, 33 Ill. 237; *Mitchell v. McDougall*, 62 Ill. 498. A person taking a bond for the future good conduct of an agent already in his employment must communicate to a surety his knowledge of the past criminal conduct of such agent in the course of his past employment. The mere nondisclosure of such knowledge, irrespective of motive or design, is a fraud, which will invalidate the bond. *Guardian Fire & Life Assur. Co. v. Thompson*, 68 Cal. 208, 9 Pac. Rep. 1; *Sooy v. State*, 39 N. J. Law, 135; *Dinsmore v. Tidball*, 34 Ohio St. 418; *Roberts v. Donovan*, 70 Cal. 108, 11 Pac. Rep. 590. See ante, p. 322. A man may avoid his promise to marry a woman if she concealed from him the fact that she had previously given birth to a bastard child, or was of immoral character. *Bell v. Eaton*, 28 Ind. 468; *Palmer v. Andrews*, 7 Wend. (N. Y.) 143; *Berry v. Bakeman*, 44 Me. 164; *Goodal v. Thurman*, 1 Head (Tenn.) 208; *Butler v. Eschelman*, 18 Ill. 44; *Copehart v. Carradine*, 4 Strob. (S. C.) 42; post, p. 344.  
<sup>99</sup> *Bryant v. Boothe*, 30 Ala. 311; *Firestone v. Werner*, 1 Ind. App. 233, 27 N. E. Rep. 623; *Burns v. Dockray* (Mass.) 30 N. E. Rep. 551; *Baker v. Rockabrand*, 118 Ill. 365, 8 N. E. Rep. 456; *Knowlton v. Amy*, 47 Mich. 204, 10 N. W. Rep. 201.

<sup>100</sup> 3 Bl. Comm. 165.

<sup>101</sup> *Hoe v. Sanborn*, 21 N. Y. 552; *French v. Vining*, 102 Mass. 132; *Marsh v. Webber*, 13 Minn. 109 (Gil. 99); *Cecil v. Spurger*, 32 Mo. 462; *Patterson v. Kirkland*, 34 Miss. 423; *Johnson v. Wallower*, 18 Minn. 288 (Gil. 262); *Cardwell v. McClelland*, 3 Sneed (Tenn.) 150; *Waters v. Mattingley*, 1 Bibb (Ky.) 244; *Maynard v. Maynard*, 49 Vt. 297; *Graham v. Stiles*, 33 Vt. 578. So, also, a person who sells cattle impliedly represents that they are not to his knowledge infected with a contagious disease. If he knows they are dis-

to conceal the fact that the maker has failed.<sup>102</sup> In these and other cases in which nondisclosure has been held equivalent to a false representation there is a duty to disclose, and the party impliedly represents that the facts concealed do not exist.

As we have shown, a man who leases premises does not commit a fraud in failing to disclose the fact that, for want of repair, they are not fit for habitation, as there is no duty to disclose what the other party may easily ascertain for himself by the exercise of reasonable diligence and prudence. It is otherwise, however, where the premises are infected with a contagious disease, or otherwise subject to a nuisance which is prejudicial to health or life. Here there is a duty to disclose the fact, and concealment is a fraud.<sup>103</sup>

*Character of Representations—Opinion or Expectation.*

To constitute fraud, the representation must be of a past or existing fact. What has been said, therefore, in treating of misrepresentation, as to expressions of opinion, is equally applicable here. A mere expression of opinion, belief, or expectation, however unfounded, will not invalidate a contract, nor give cause for an action for deceit.<sup>104</sup>

ceased, and conceals the fact from the purchaser, he commits a fraud. See *Bodger v. Nichols*, 28 Law T. (N. S.) 441; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 318; *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. Rep. 421. But see *Hill v. Balls*, 2 Hurl. & N. 299. The rule does not apply if the sale is "with all faults," *Ward v. Hobbs*, 8 Q. B. Div. 150, 4 App. Cas. 14; *West v. Anderson*, 9 Conn. 107; *Whitney v. Boardman*, 118 Mass. 242; *Boglehole v. Walters*, 8 Camp. 154; *Schneider v. Heath*, 3 Camp. 506; but not if the seller makes efforts to prevent the buyer from discovering the defects, *West v. Anderson*, supra; *Boglehole v. Walters*, supra; *Schneider v. Heath*, supra; note 96, supra. In the sale of a horse, for instance, which has a secret malady of a fatal character, which is known to the seller, but which, to his knowledge, is not suspected by the purchaser, and which the seller knows would prevent the sale if known to the purchaser, it is the seller's duty to apprise the purchaser that he must take the animal with all faults, or in some way put him on his guard, or else disclose his knowledge on the subject. The suppression of the truth in such a case is equivalent to a positive representation that the animal is such as it appears as far as the seller knows, if he knows that the purchaser is acting on that belief. *Paddock v. Strobridge*, 29 Vt. 470.

<sup>102</sup> *Brown v. Montgomery*, 20 N. Y. 287.

<sup>103</sup> *Minor v. Sharon*, 112 Mass. 477; *Cesar v. Karutz*, 60 N. Y. 229.

<sup>104</sup> *Gordon v. Parmelee*, 2 Allen (Mass.) 212; *Gordon v. Butler*, 105 U.

If, for instance, the seller of property says it is worth so much, this is a mere expression of opinion upon which the buyer may or may not act, just as he chooses.<sup>105</sup> So, also, where a person makes a false representation as to the harvest which land sown in certain crops will produce,<sup>106</sup> or as to the cubic contents of a piece of grading which he employs another to do,<sup>107</sup> or as to what it will cost to build a house,<sup>108</sup> these are all mere expressions of opinion, and, as a rule, do not amount to fraud.<sup>109</sup>

*Same—Statement of Intention, Expectation, or Promises.*

A representation of fact is a statement that a thing was or is, and does not, therefore, include expressions of intention or expectation, or promises, or other representations that a thing shall be.<sup>110</sup> Not

S. 553; *Mooney v. Miller*, 102 Mass. 217; *Sawyer v. Prickett*, 19 Wall. 146; *Allen v. Hart*, 72 Ill. 104; *Buschman v. Codd*, 52 Md. 207; *Douglass v. Litter*, 58 Ill. 342; *Warren v. Doolittle*, 61 Ill. 171; *Ellis v. Andrews*, 56 N. Y. 83; *Chrysler v. Canaday*, 90 N. Y. 272; *Beard v. Billey* (Colo. App.) 34 Pac. Rep. 271; *Montreal Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. Rep. 507; *Southern Dev. Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. Rep. 881; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. Rep. 161; *Nash v. Trust Co.*, 159 Mass. 437, 34 N. E. Rep. 625; *Reeves v. Corning*, 51 Fed. Rep. 774; *Dillman v. Nadle-hoffer*, 119 Ill. 567, 7 N. E. Rep. 88. But see *Chase v. Boughton*, 93 Mich. 285, 54 N. W. Rep. 44.

<sup>105</sup> *Medbury v. Watson*, 6 Metc. (Mass.) 246; *Hemmer v. Cooper*, 8 Allen (Mass.) 334; *Harvey v. Young*, 1 Yel. 20; *Moore v. Turbeville*, 2 Bibb (Ky.) 602; *Lindsay Pet. Co. v. Hurd*, L. R. 5 P. C. 243; *Simar v. Canaday*, 53 N. Y. 298; *Shanks v. Whitney* (Vt.) 29 Atl. Rep. 367; *Johnson v. Seymour*, 79 Mich. 156, 44 N. W. Rep. 344; *Geddes' Appeal*, 80 Pa. St. 442; *Doran v. Eaton*, 40 Minn. 35, 41 N. W. Rep. 244; *Belz v. Keller* (Ky.) 1 S. W. Rep. 420; *Davis v. Meeker*, 5 Johns. (N. Y.) 354; *Ellis v. Andrews*, 56 N. Y. 83; *Noetting v. Wright*, 72 Ill. 390; *Lockwood v. Flitts* (Ala.) 7 South. Rep. 467; *Gordon v. Butler*, 105 U. S. 553; *Cogney v. Cuson*, 77 Ind. 494. But see *Crane v. Elder*, 48 Kan. 259, 20 Pac. Rep. 151.

<sup>106</sup> *Holton v. Noble*, 83 Cal. 7, 23 Pac. Rep. 58.

<sup>107</sup> *East v. Worthington*, 88 Ala. 537, 7 South. Rep. 189.

<sup>108</sup> *Sweney v. Davidson*, 68 Iowa, 389, 27 N. W. Rep. 278.

<sup>109</sup> Representations as to the speed of a horse not made as of personal knowledge. *State v. Case*, 52 N. J. Law, 77, 18 Atl. Rep. 972. Representation that a stallion will not produce sorrel colts. *Scrogin v. Wood* (Iowa) 54 N. W. Rep. 437. Representations as to solvency and credit. See *Homer v. Perkins*, 124 Mass. 431; *Yaeger Milling Co. v. Lawler* (La. Ann.) 2 South. Rep. 398; *Childs v. Merrill*, 68 Vt. 463, 22 Atl. Rep. 626. And see post, p. 334.

<sup>110</sup> *Dawe v. Morris*, 149 Mass. 188, 21 N. E. Rep. 313; *Burrell's Case*, 1

withstanding this, a representation of intention may amount to a fraudulent representation. The law makes a distinction between a promise which the promisor, when he makes it, intends to perform, and one which he intends to break. In the first case he represents truly enough his intention that something shall take place in the future, while in the second case he misrepresents his existing intention. He not merely makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be other than it really is. It is therefore, as we have already seen, very generally held that if a man buys goods, not intending at the time to pay for them, he makes a fraudulent representation.<sup>111</sup>

*Same—Misrepresentation of Law.*

As a rule, misrepresentation of law does not amount to a fraudulent representation for which an action of deceit will lie, nor make a contract voidable. A contract, therefore, cannot, unless there are peculiar circumstances of fraud, or a relation of trust and confidence between the parties,<sup>112</sup> be rescinded by one party on the ground that the other falsely represented the legal effect of the contract, or otherwise misrepresented the law.<sup>113</sup> As already stated, ig-

Ch. Div. 552; Knowlton v. Keenan, 146 Mass. 86, 15 N. E. Rep. 127; Saunders v. McClintock, 46 Mo. App. 216; Gage v. Lewis, 68 Ill. 604; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. Rep. 161; Lawrence v. Gayetty, 78 Cal. 126; Haenni v. Blesch, 146 Ill. 262, 34 N. E. Rep. 153; Balue v. Taylor (Ind.) 36 N. E. Rep. 269; Birmingham Warehouse, etc., Co. v. Elyton Land Co., 93 Ala. 549; Gray v. Manufacturing Co., 127 Ill. 187, 19 N. E. Rep. 874. But see Williams v. Kerr, 152 Pa. St. 560, 25 Atl. Rep. 618; Moore v. Cross (Tex. Civ. App.) 26 S. W. Rep. 122. Representation that stock sold will pay a certain dividend. Robertson v. Parks, 76 Md. 118, 24 Atl. Rep. 411.

<sup>111</sup> Ante, p. 327. We have also in that connection considered the effect of failure to disclose insolvency.

<sup>112</sup> Berry v. Whitney, 40 Mich. 71.

<sup>113</sup> Upton v. Tribilcock, 91 U. S. 45; Fish v. Cleland, 33 Ill. 238; Rufus v. McCounell, 17 Ill. 212; Wheaton v. Wheaton, 9 Conn. 96; Grant v. Grant, 56 Me. 573; Bank v. Daniel, 12 Pet. 32; Pinkham v. Greer, 3 N. H. 163; Clem v. Newcastle & D. R. Co., 9 Ind. 488; Aetna Ins. Co. v. Reed, 33 Ohio St. 293; Townsend v. Cowles, 31 Ala. 428; Simms v. Ferre, 45 Ga. 583; Starr v. Bennett, 5 Hill (N. Y.) 303; Russell v. Braham, 8 Blackf. (Ind.) 277; Moorland v. Atchison, 19 Tex. 303; People v. Supervisors, 27 Cal. 655; Drake v. Latham, 50 Ill. 270; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. Rep. 88. But see Un-



norance of foreign laws, which include the laws of a sister state, is regarded as ignorance of fact, and not of law, and misrepresentation in regard thereto is misrepresentation of fact.<sup>114</sup>

*Same—Materiality.*

Not only must the representation be of a fact, but it must be of a material fact. A false representation of an immaterial fact, whatever may have been the intention, has no effect.<sup>115</sup> It may often be difficult to say when a representation is material, but it is probably safe to say that it is always material if, had it been known to be false, the contract would not have been entered into.<sup>116</sup>

*Right to Rely on Statements.*

In order that a person may be entitled to rescind his contract, or maintain an action for deceit, because of false representations, the representations must have been of such a character, and must have been made under such circumstances, that he had a right to rely on them. Representations, for instance, amounting merely to commendatory expressions, or exaggerated statements as to value, or prospects, or the like, as where a seller puffs up the value and quality of his goods, or a man, to induce another to contract with him, holds out flattering prospects of gain, are not regarded as fraudulent.<sup>117</sup>

*derwood v. Brockman*, 4 Dana (Ky.) 309; *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125; *Lowndes v. Chisholm*, 2 McCord, Ch. (S. C.) 455. False representation by the lessor of property that the lessee will have the right to sell intoxicating liquors therein. *Gormely v. Gymnastic Ass'n*, 55 Wis. 350, 13 N. W. Rep. 242.

<sup>114</sup> *Haven v. Foster*, 9 Pick. (Mass.) 112; ante, p. 306.

<sup>115</sup> *Young v. Young*, 113 Ill. 430; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. Rep. 313; *Geddes v. Pennington*, 5 Dow, 159; *Davis v. Davis* (Mich.) 56 N. W. Rep. 774; *Nounnan v. Land Co.*, 81 Cal. 1, 22 Pac. Rep. 515; *Winston v. Young*, 52 Minn. 1, 53 N. W. Rep. 1015; *Palmer v. Bell*, 85 Me. 352, 27 Atl. Rep. 250; *Curtiss v. Howell*, 39 N. Y. 211.

<sup>116</sup> *McAleer v. Horsey*, 35 Md. 430; *Powers v. Fowler*, 156 Mass. 318, 32 N. E. Rep. 166; *Holst v. Stewart* (Mass.) 87 N. E. Rep. 755. As to financial condition, *Reid v. Cowduroy*, 79 Iowa, 169, 44 N. W. R. p. 351; post, p. 344, and cases cited.

<sup>117</sup> *Deming v. Darling*, 148 Mass. 504, 20 N. E. Rep. 107; *Hughes v. Antietam Co.*, 34 Md. 318; *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. Rep. 113; *Lockwood v. Pitts*, 90 Ala. 150, 7 South. Rep. 467; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. Rep. 881; *Dillman v. Nadlehofer*, 119 Ill. 507, 7 N. E. Rep. 88; *Jackson v. Collins*, 39 Mich. 557. See the cases cited in

So long as the representations do not go beyond this, the other party must look out for himself. As we have seen, the buyer of property is not justified in relying on the seller's representation as to its value.<sup>118</sup> Some of the courts hold, however, that a statement by the seller of property that he gave so much for it is a representation of fact upon which the buyer may rely, and that, if it is knowingly false, it amounts to fraud.<sup>119</sup> Other courts hold that such a statement is merely a commendatory expression, on which the buyer must not rely;<sup>120</sup> but, even where the statement is thus regarded, the circumstances may be such as to justify the buyer in relying on it, as for instance, where the parties do not meet on equal terms, or there is a relation of confidence between them. In such a case the statement may be fraudulent.<sup>121</sup>

notes 88, 104, *supra*. Representations by the purchaser of goods to the seller as to the market price, though false, are no ground for rescission where the circumstances were not such as to make it the purchaser's duty to communicate his knowledge to the seller. *Barns v. Mahannah* (Kan.) 17 Pac. Rep. 319. The circumstances may be such that a person has a right to rely even on representations as to value, and in such a case they cannot be excused as mere exaggerated statements. It has been held, for instance, that where a person negotiating for the purchase of an invention from the inventor knows nothing about the facts, and has no ready means of information, and the invention cannot be properly tested except by experts, he has a right to rely on the inventor's representation as to the value of the invention, and false representations in that respect amount to fraud. *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. Rep. 241.

<sup>118</sup> Ante, p. 331.

<sup>119</sup> *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Prendergast v. Reed*, 29 Md. 398; *Salm v. Israel*, 74 Iowa, 314, 37 N. W. Rep. 387; *Weidner v. Phillips*, 39 Hun (N. Y.) 1; *Teachout v. Van Hoesen*, 76 Iowa, 113, 40 N. W. Rep. 96; *Ives v. Carter*, 24 Conn. 392.

<sup>120</sup> *Tuck v. Downing*, 76 Ill. 71; *Medbury v. Watson*, 6 Metc. (Mass.) 246; *Cooper v. Lovering*, 106 Mass. 77; *Hemmer v. Cooper*, 8 Allen (Mass.) 334; *Bishop v. Small*, 63 Me. 12; *Banta v. Palmer*, 47 Ill. 99; *Richardson v. Noble*, 77 Me. 390; *Holbrook v. Connor*, 60 Me. 578.

<sup>121</sup> *Teachout v. Van Hoesen*, 76 Iowa, 113, 40 N. W. Rep. 96; *Hawk v. Brownell*, 120 Ill. 161, 11 N. E. Rep. 416; *Banta v. Palmer*, 47 Ill. 99; *Simar v. Canaday*, 53 N. Y. 298; *Jackson v. Collins*, 39 Mich. 557; *Stoppleman v. Paetz*, 75 Wis. 510, 44 N. W. Rep. 834; *Chrysler v. Canaday*, 90 N. Y. 272; *Tuck v. Downing*, 76 Ill. 71; *Allen v. Hart*, 72 Ill. 104.

*Same—Credulity and Negligence of Party Defrauded.*

A party cannot avoid the effect of his false and fraudulent representations of fact by alleging that the other party was too credulous, or that he was guilty of negligence in relying on the representations instead of making inquiry or examination for himself, provided the circumstances were such as to justify his reliance; as, for instance, where the parties were not on an equal footing as to means of knowledge, or, in case of misrepresentation as to the character of the instrument, where the party deceived was unable to read.<sup>122</sup> About this there can be no doubt. The difficulty is in determining when reliance on the representations is justified. There are many cases, in addition to those to which we have already called attention, in which a person acts at his peril if he fails to make proper inquiry,—cases in which the rule caveat emptor applies.<sup>123</sup> "It may be difficult," it has been said, "to draw the line which separates cases within the rule [that is, the rule caveat emptor] from those to which it does not apply, as each case depends to some extent upon its peculiar circumstances; but it applies generally to

<sup>122</sup> Cottrill v. Crum, 100 Mo. 397, 13 S. W. Rep. 753, and authorities there cited; David v. Park, 103 Mass. 501; Mead v. Bunn, 32 N. Y. 275; Warder v. Whitish, 77 Wis. 430, 46 N. W. Rep. 540; Eaton v. Winne, 20 Mich. 156; Kendall v. Wilson, 41 Vt. 567; Pierce v. Wilson, 34 Ala. 603; Hale v. Philbrick, 42 Iowa, 81; Sutton v. Morgan (Pa. Sup.) 27 Atl. Rep. 894; Hicks v. Stevens, 121 Ill. 180, 11 N. E. Rep. 241; Endsley v. Johns, 120 Ill. 469, 12 N. E. Rep. 247; Linington v. Strong, 107 Ill. 295, at page 302; Ladd v. Pigott, 114 Ill. 647, 2 N. E. Rep. 503; Oswald v. McGehee, 28 Miss. 340; McClellan v. Scott, 24 Wis. 81; Walsh v. Hall, 66 N. C. 233; Chamberlin v. Fuller, 59 Vt. 247, 9 Atl. Rep. 832; Redding v. Wright, 49 Minn. 322, 51 N. W. Rep. 1056; Porter v. Fletcher, 25 Minn. 493; Gammill v. Johnson, 47 Ark. 335, 1 S. W. Rep. 610; Erickson v. Fisher (Minn.) 53 N. W. Rep. 638. Many of the courts seem to hold, without any qualification, that a person guilty of a fraudulent misrepresentation cannot escape the effect of his fraud on the ground of the other party's negligence. See the cases above cited; and see Schrimpton v. Philbrick (Minn.) 55 N. W. Rep. 551.

<sup>123</sup> Long v. Warren, 68 N. Y. 426; Moore v. Turbeville, 2 Bibb (Ky.) 602; Poland v. Brownell, 131 Mass. 138; Graffenstein v. Epstein, 23 Kan. 443; Parker v. Moulton, 14 Mass. 99; Homer v. Perkins, 124 Mass. 431; Chrysler v. Canaday, 90 N. Y. 272; Saunders v. Hatterman, 2 Ired. (N. C.) 32 (this case, however, is contrary to the weight of authority in the extent to which it goes); Williams v. McFadden, 23 Fla. 143, 1 South Rep. 618.

cases free from actual fraud, where the parties deal upon an equal footing, and with equal means of knowledge; and it is not applicable, as a general rule, where false and fraudulent representations of material facts are made by the vendor, and the parties have not equal facilities for ascertaining the truth. In such cases the purchaser has the right to rely upon the statements of the vendor; and, when the purchaser is justified in relying upon the representations of the vendor, the rule *caveat emptor* does not apply."<sup>124</sup>

<sup>124</sup> *Stewart v. Stearns*, 63 N. H. 99. And see *Dambmann v. Schulting*, 75 N. Y. 55. A vendee of land may take advantage of a false and fraudulent representation by the vendor as to the character and condition of the land, though he may have seen it himself, if the defects were not apparent. *Jackson v. Armstrong*, 50 Mich. 65, 14 N. W. Rep. 702. "Where a person signs an instrument without reading it, or, if he cannot read, without asking to have it read to him, the legal effect of the signature cannot be avoided by showing his ignorance of its contents, in the absence of some fraud, deceit, or misrepresentation having been practiced upon him. But the rule is otherwise, and the instrument may be avoided, where its execution is obtained by a misrepresentation of its contents; the party signing a paper which he did not know he was signing, and did not really intend to sign. It is immaterial, in the latter aspect of the case, that the party signing had an opportunity to read the paper; for he may have been prevented from doing so by the very fact that he trusted to the truth of the representation made by the other party." *Burroughs v. Guano Co.*, 81 Ala. 255, 1 South. Rep. 212; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. Rep. 627. And see *Taylor v. Fleckenstein*, 30 Fed. Rep. 99; *Keller v. Orr*, 106 Ind. 406, 7 N. E. Rep. 195; *Wallace v. Railroad Co.*, 67 Iowa, 547, 25 N. W. Rep. 772; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. Rep. 710; *First Nat. Bank v. Deal*, 55 Mich. 592, 22 N. W. Rep. 53; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. Rep. 818; *Smith v. Smith*, 134 N. Y. 62, 31 N. E. Rep. 258; *Rider v. Kelso*, 53 Iowa, 367, 5 N. W. Rep. 509. So, also, where the buyer of an article, or of land, relies on a representation fraudulently made by the vendor, as a rule, he is not barred of his right to relief by the mere fact that he had an opportunity of discovering that the representation was false, and might have known the truth by proper inquiry and examination. *Burroughs v. Guano Co.*, 81 Ala. 255, 1 South. Rep. 212; *Baker v. Lever*, 67 N. Y. 304; *Jackson v. Collins*, 39 Mich. 557; *Kendall v. Wilson*, 41 Vt. 567; *Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. Rep. 744; *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. Rep. 736; *Lewis v. Jewell*, 151 Mass. 345, 24 N. E. Rep. 52; *Burr v. Willson*, 22 Minn. 206; *Ladd v. Pigott*, 114 Ill. 647, 2 N. E. Rep. 503; *Clark v. Balls* (Iowa) 24 N. W. Rep. 567; *Kennedy v. Harding*, 85 Ill. 264. In an Illinois case it was said: "The doctrine is well settled that, as a rule, a party guilty of fraudulent conduct shall not be

*Knowledge of Falsity—Recklessness.*

As a rule, unless a false representation is made with knowledge of its falsity, or, what amounts to the same thing, in reckless disregard of whether it is true or false, it is not fraudulent, and will not support an action of deceit. "The general rule of law," it is said, "is clear that no action is maintainable for a mere statement, although untrue, and although acted upon to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it;"<sup>125</sup> but, as already stated, this rule is subject to the qualification "that if persons take upon themselves to make assertions, as to which they are ignorant whether they are true or not, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue."<sup>126</sup> Even

allowed to cry 'negligence' as against his own deliberate fraud. Even where parties are dealing at arm's length, if one of them makes to the other a positive statement upon which the other acts (with the knowledge of the party making the statement) in confidence of its truth, and such statement is known to be false by the party making it, such conduct is fraudulent, and from it the party guilty of fraud can take no benefit. While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule; and, as between the original parties to the transaction, we consider that where it appears that one party has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other party has been misled, or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care." *Linington v. Strong*, 107 Ill. 295.

<sup>125</sup> *Dickson v. Reuter's Tel. Co.*, 3 C. P. Div. 1; *Johnston v. Bent*, 93 Ala. 160, 9 South. Rep. 581; *Williams v. McFadden*, 23 Fla. 143, 1 South. Rep. 618; *Buschman v. Codd*, 52 Md. 202.

<sup>126</sup> Per Lord Cairns, in *Reese River Min. Co. v. Smith*, L. R. 4 H. L. 79; *Hamlin v. Abell* (Mo. Sup.) 25 S. W. Rep. 516; *Cann v. Wilson*, 39 Ch. Div. 39; *Peek v. Derry*, 37 Ch. Div. 541; *Fisher v. Mullen*, 103 Mass. 503; *Cole v. Cassidy*, 138 Mass. 437; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Litchfield v. Hutchison*, 117 Mass. 195; *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. Rep. 138; *Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Falker*, 40 N. Y. 562; *Allen v. Hart*, 72 Ill. 104; *Case v. Ayers*, 65 Ill. 142; *Wildor v. De Cou*, 18 Minn. 470 (Gil. 421); *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. Rep. 108; *Stone v. Covell*, 29 Mich. 359; *Bristol v. Braidwood*, 28 Mich.

this qualification, however, is not universally recognized. Some courts hold, or seem to hold, that there must have been knowledge of the falsity of the representation, and that a false statement is not fraudulent merely because the party making it has no reasonable ground for believing it to be true.<sup>127</sup> According to these decisions, the question is whether there was good faith.

If a person makes a false representation which he believes to be true, but adds an affirmation that he makes the representation as of his own knowledge, the affirmation is knowingly false, and there is fraud; or if, according to many of the cases, a person states, as of his own knowledge, without such an express affirmation, material facts which are susceptible of knowledge, and which are false, there is fraud, even though he believed the statement to be true.<sup>128</sup> It has been said, however, that "in such cases the force and effect of the

191; *Walsh v. Morse*, 80 Mo. 568; *Caldwell v. Henry*, 76 Mo. 254; *Cotzhausen v. Simon*, 47 Wis. 103, 1 N. W. Rep. 473; *Indianapolis, P. & C. R. Co. v. Tyng*, 63 N. Y. 653; *Cabot v. Christie*, 42 Vt. 121; *Ruff v. Jarrett*, 94 Ill. 475; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. Rep. 360; *Bower v. Fenn*, 90 Pa. St. 359; *Leavitt v. Sizer*, 35 Neb. 80, 52 N. W. Rep. 832.

<sup>127</sup> *Derry v. Peek*, 14 App. Cas. 337; *Merwin v. Arbuckle*, 81 Ill. 501; *Cox v. Higbee*, 100 Pa. St. 249; *Wilcox v. University*, 32 Iowa, 367; *Holmes v. Clark*, 10 Iowa, 423; *Lord v. Goddard*, 13 How. 198; *Pettigrew v. Chillis*, 41 N. H. 95; *Oberlander v. Spliss*, 45 N. Y. 175; *Terrell v. Bennett*, 18 Ga. 404; *Scrogin v. Wood* (Iowa) 54 N. W. Rep. 437; *Lawton v. Goodrich* (Sup.) 7 N. Y. Supp. 76; *Morton v. Scull*, 23 Ark. 289; *Farmers' Ass'n v. Scott* (Kan.) 36 Pac. Rep. 978; *Kingsbury v. Taylor*, 29 Me. 508.

<sup>128</sup> *Litchfield v. Hutchinson*, 117 Mass. 197; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. Rep. 168; *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. Rep. 139; *Raley v. Williams*, 73 Mo. 310; *Bullitt v. Farrar*, 42 Minn. & 43 N. W. Rep. 506; *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. Rep. 138; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. Rep. 360; *McBeth v. Craddock*, 28 Mo. App. 380; *Montreal Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. Rep. 507; *Brooks v. Hamilton*, 15 Minn. 26 (Gil. 10); *Cabot v. Christie*, 42 Vt. 121. When a party, in making a contract, makes an affirmation positive in form, it is to be taken as made as of his own knowledge. *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. Rep. 533. The fraud in such a case "consists in stating that the party knows the thing to exist when he does not know it to exist; and, if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." *Chatham Furnace Co. v. Moffatt*, supra. And see *Alvarez v. Brannan*, 7 Cal. 503.

evidence will depend in a great measure upon the nature of the subject concerning which the representation was made. If it be with reference to a specific fact or facts, susceptible of exact knowledge, and the subject-matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and, that being untrue, the falsehood would be willful, and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge \* \* \* 'is to be taken secundum subjectam materiam, as meaning no other than a strong belief upon what appeared to the defendant to be reasonable and certain grounds.' In such a case the question is wholly one of good faith."<sup>129</sup>

The fact that the party making the representation professed to rely on the representations of others, and gave the source of his information, is immaterial, if he knew, or had reason to believe, that they were untrue.<sup>130</sup>

Sometimes the judges use the expressions "fraud in law" and "legal fraud," and it is no doubt from this that much of the confusion on this branch of the law has resulted; but, according to the better opinion, the terms are meaningless, and it is held that, to make a man liable for fraud, moral fraud must be proved against him. "I do not understand legal fraud," said Bramwell, L. J., in an English case. "To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-grounded complaint of legal fraud or of anything else, except where some duty is shown, and correlative right, and some violation of that duty and right; and when these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty."<sup>131</sup>

<sup>129</sup> *Cowley v. Smyth*, 46 N. J. Law, 380; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. Rep. 506; *State v. Case*, 52 N. J. Law, 77, 18 Atl. Rep. 972.

<sup>130</sup> *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. Rep. 736.

<sup>131</sup> *Weir v. Bell*, 3 Exch. Div. 243.

*Intention.*

The representation, to constitute fraud, must have been made with the intention that it should be acted upon, and that it should be acted upon by the injured party.<sup>123</sup> It need not have been made to the injured party himself, but it must have been made with the intention that he should act upon it. If a person, desiring to enter into a contract with another, should make a representation to a third person with the intention that it should reach the ears of such other person, and be acted upon by him, in entering into the contract, this would constitute a fraudulent misrepresentation equally as if it had been made to the other party.<sup>123</sup> Where a gun was sold to a man for the use of himself and sons, the seller falsely representing that it had been made by a certain maker, and was a good, safe, and secure gun, it was held that a son of the buyer who was injured by the gun's exploding could sue the seller for deceit. In that case it was argued that the defendant could not be held liable to the plaintiff for a representation not made to him; but the court held that inasmuch as the gun was sold to the father to be used by the plaintiff, and there was a false representation to effect the sale, and "as there was fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results," the defendant was liable.<sup>124</sup>

<sup>123</sup> *Buschman v. Codd*, 52 Md. 202; *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. Rep. 138; *Bach v. Tuch* (Sup.) 10 N. Y. Supp. 884; *Carter v. Harden*, 73 Me. 528, 7 Atl. Rep. 392. It has also been said that "a misrepresentation which will entitle the party misled to a rescission of a contract must have been made as part of the same transaction," and that the effect of this rule is that "the untruth of a representation made to the party on some former occasion, and for a different purpose, cannot be relied on as a ground either for rescinding a contract, or for maintaining an action of deceit." *Barnett v. Barnett*, 83 Va. 504, 2 S. E. Rep. 733. It is believed, however, to be immaterial when the representation was made in point of time, provided it was made with the intention that it should be acted upon in the particular transaction. This intention is the important question, and the time of the representation can only be material as tending to show whether it existed.

<sup>124</sup> *Longridge v. Levy*, 2 Mees. & W. 519; *Snow v. Judson*, 38 Barb. (N. Y.) 210; *Benton v. Pratt*, 2 Wend. (N. Y.) 385; *Chubbuck v. Cleveland*, 37 Minn. 466, 35 N. W. Rep. 362; *Waterbury v. Andrews*, 67 Mich. 281, 84 N. W. Rep. 575; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. Rep. 915.

<sup>124</sup> *Longridge v. Levy*, *supra*. So, where a druggist negligently labels a poison as a harmless medicine, and sells it to dealers in such articles, he is



So, also, where a merchant makes a false statement as to his financial responsibility to a mercantile agency for the purpose of procuring credit, and customers of the agency, in reliance thereon, give him credit, and are defrauded, they may maintain an action of deceit against him, or avoid their contract with him on the ground of fraud.<sup>135</sup>

The representation, however, must have been made with the intention that it should be acted upon by the injured party, though, as we have seen, it need not be made directly to him. "Every man," it has been said, "must be held liable for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. But, to bring it within the principle, the injury, I apprehend, must be the immediate, and not the remote, consequence of the representation thus made."<sup>136</sup> Thus, where the directors of a company made false statements in the prospectus of the company, which would have made them liable to the original allottees of shares, they were held not to be liable to persons who subsequently purchased shares which came into the market, on the ground that their intention to deceive could not be supposed to extend beyond the original applicants for shares.<sup>137</sup> The directors in such a case

liable for an injury to any one who buys and uses it, if there is no negligence on the part of the intermediate seller or the purchaser. *Thomas v. Winchester*, 6 N. Y. 397; *Wellington v. O'Connell*, 104 Mass. 64. But see *Davidson v. Nichols*, 11 Allen (Mass.) 519. So, where a chemist sells an article which he represents as fit for washing the hair, knowing it is to be used by the purchaser's wife, he is liable for injuries sustained by her in using it. *George v. Skivington*, L. R. 5 Exch. 1.

<sup>135</sup> *Eaton v. Avery*, 83 N. Y. 31; *Genesee Sav. Bank v. Barge Co.*, 52 Mich. 164, 17 N. W. Rep. 790; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. Rep. 802; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. Rep. 103; *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. Rep. 790; *Gainesville Nat. Bank v. Bramberger*, 77 Tex. 48, 13 S. W. Rep. 959; *Clafin v. Flack* (Com. Pl. N. Y.) 13 N. Y. Supp. 269. As to the duty of a merchant to notify a mercantile agency, to whom he has made a statement, that his circumstances have since changed, see *Cortland Manuf'g Co. v. Platt*, 83 Mich. 419, 47 N. W. Rep. 330.

<sup>136</sup> *Barry v. Crosky*, 2 Johns. & H. 1.

<sup>137</sup> *Peek v. Gurney*, L. R. 6 H. L. 377, 410. And see *Nash v. Trust Co.*, 159

would be liable to the original applicants for shares, relying on the prospectus.<sup>138</sup>

*Same—Dishonesty of Motive.*

If a person, to induce another to enter into a contract with him, makes a representation which he knows to be untrue, or of the truth or falsity of which he is recklessly ignorant, he is guilty of a fraud, although he may not have been actuated by any dishonest motive. It will not do for him to say that he thought things would turn out profitably for the other party. If a man chooses to make such assertions, hoping or even believing that all will turn out well, he cannot escape the results of his fraud by showing the excellence of his motives.<sup>139</sup> Thus, where a person accepted a bill of exchange drawn on another person, and falsely represented that he had authority from that other to do so, he was held liable in an action of deceit brought against him by an indorsee, the acceptance having been repudiated by the drawee and the bill dishonored; and the fact that the defendant honestly believed that the acceptance would be sanctioned by the drawee, and the bill paid, was held immaterial. "If the defendant," said Lord Tenderden, "when he wrote the acceptance, and thereby in substance represented that he had authority from the drawee to make it, knew that he had no such authority, the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence."<sup>140</sup>

Mass. 437, 34 N. E. Rep. 625; *Davidson v. Nichols*, 11 Allen (Mass.) 514. It has been held that it could not be said, as a matter of law, that false representations concerning the value of certain stock, by which a person was induced to buy, may not have continued in his mind, and induced him to buy more of the stock a year later. *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. Rep. 988.

<sup>138</sup> *Reese River Min. Co. v. Smith*, 4 H. L. Cas. 64; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188.

<sup>139</sup> *Polhill v. Walter*, 3 Barn. & Adol. 114. A buyer of goods cannot avoid the effect of knowingly false statements as to his financial condition by showing that he intended and expected to pay for them. *Judd v. Weber*, 55 Conn. 267, 11 Atl. Rep. 40. See, also, ante, p. 328.

<sup>140</sup> *Polhill v. Walter*, supra.

*Representation must Deceive.*

A false representation, to constitute fraud, must actually deceive; that is, it must be relied on by the other party, and must induce him to act to his prejudice. If it is not believed, or the party disregards it, and makes inquiries for himself, there is no fraud.<sup>141</sup> In a leading case on this subject it appeared that the defendant had bought a cannon from the plaintiff, having a defect in it which rendered it worthless, and the plaintiff had endeavored to conceal the defect by inserting a metal plug in the weak spot. The defendant never inspected the cannon. He accepted it, and, in using it, it burst. It was held that the attempted fraud, having had no operation upon the mind of the defendant, did not exonerate him from paying for the gun. "If," said the court, "the plug which it was said was put in to conceal the defect had never been there, his position

<sup>141</sup> Arkwright v. Newbold, 17 Ch. Div. 324; Ming v. Woffolk, 116 U. S. 599, 6 Sup. Ct. Rep. 489; Marshall v. Hubbard, 117 U. S. 415, 6 Sup. Ct. Rep. 806; Ely v. Stewart, 2 Md. 408; Tuck v. Downing, 76 Ill. 71; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. Rep. 138; Crehore v. Crehore, 97 Mass. 330; Runge v. Brown, 23 Neb. 817, 37 N. W. Rep. 660; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. Rep. 376; Hagee v. Grossman, 31 Ind. 223; Craig v. Hamilton, 118 Ind. 565, 21 N. E. Rep. 315; Priest v. White, 89 Mo. 609, 1 S. W. Rep. 361; Buschman v. Codd, 52 Md. 202; Fauntleroy v. Wilcox, 80 Ill. 477; Bartlett v. Blaine, 83 Ill. 25; Denny v. Woods, 2 Ind. App. 301, 28 N. E. Rep. 443; Farrar v. Churchill, 135 U. S. 616, 10 Sup. Ct. Rep. 771; Taylor v. Guest, 58 N. Y. 262; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. Rep. 915; Cobb v. Wright, 43 Minn. 83, 44 N. W. Rep. 662; Slaughter v. Gerson, 13 Wall. 379; Wimer v. Smith, 22 Or. 469, 30 Pac. Rep. 416; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. Rep. 39; Shoemaker v. Coke, 83 Va. 1, 1 S. E. Rep. 387; Darby v. Kroell, 92 Ala. 607, 8 South. Rep. 384; Pratt v. Burhaus, 84 Mich. 487, 47 N. W. Rep. 1064; Lee v. Burnham, 82 Wis. 209, 52 N. W. Rep. 255; Fowler v. McCann (Wis.) 56 N. W. Rep. 1085; Black v. Black, 110 N. C. 398, 14 S. E. Rep. 971. Though, as we have seen, a man may avoid his marriage promise if the woman concealed her previous loose and immoral character (note 98, supra), he cannot do so if he knew of it. Kelley v. Highfield, 15 Or. 277, 14 Pac. Rep. 745; Rich v. Mayer (City Ct. N. Y.) 7 N. Y. Supp. 69; Berry v. Bakeman, 44 Me. 164. In an action to cancel an agreement for fraudulent representations, defendant cannot show that plaintiff did not rely on his representations by evidence that she investigated the matter for herself, and expressed herself as fully satisfied, when the investigations consisted merely in asking information from persons to whom she was referred by defendant, and who knew and could know nothing about the matter except what they were told of it by him. Kelley v. Owens (Cal.) 30 Pac. Rep. 506.

would have been the same; for, as he did not examine the gun, or form any opinion as to whether it was sound, its condition did not affect him."<sup>143</sup> If the representation was one calculated to induce the other party to make the contract, the inference of law is that he was influenced by it; and, in order to take away his right to relief on the ground of fraud, it must be shown either that he had knowledge of facts contrary to the representation, or that he showed by his conduct that he did not rely on it.<sup>145</sup>

The representation need not have been the sole inducement to enter into the contract. If it was a material inducement,—that is, if it so contributed as an inducement that without it the contract would not have been made,—it is sufficient.<sup>144</sup>

*Injury must Result.*

It is essential, in order to sustain an action of deceit, or to give a party the right to avoid a contract on the ground of fraud, that he shall have been prejudiced or injured by the fraud.<sup>146</sup> Where, for instance, a person was induced to exchange his property for shares of stock by false representations of the other party, but the stock was worth what he gave for it, so that he suffered no injury, it was held that he could not maintain an action for deceit.<sup>148</sup> And, in a case in which the seller of property had falsely represented that there was no mortgage thereon, it was held that the purchaser could not avoid the sale, where the seller had the mortgage released as soon as his attention was called to it.<sup>147</sup>

<sup>143</sup> *Horsfall v. Thomas*, 1 Hurl. & C. 90, 99.

<sup>144</sup> *Redgrave v. Hurd*, 20 Ch. Div. App. 21; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. Rep. 241.

<sup>145</sup> *Peek v. Derry*, 37 Ch. Div. 541, L. R. 14 App. Cas. 337; *Safford v. Grout*, 120 Mass. 20; *Burr v. Willson*, 22 Minn. 206; *Libby v. Ahrens*, 28 S. C. 275, 2 S. E. Rep. 387; *Morgan v. Skiddy*, 62 N. Y. 319; *Saunders v. McClintock*, 46 Mo. App. 216; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. Rep. 799; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. Rep. 241; *Ruff v. Jarrett*, 94 Ill. 475; *Moline Milburn Co. v. Franklin*, 37 Minn. 137, 33 N. W. Rep. 323.

<sup>146</sup> *Schubart v. Coke Co.*, 41 Ill. App. 181; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. Rep. 386. But see *Northrop v. Hill*, 57 N. Y. 351.

<sup>147</sup> *Alden v. Wright*, 47 Minn. 225, 49 N. W. Rep. 767, and cases there cited.

<sup>148</sup> *Johnson v. Seymour*, 79 Mich. 156, 44 N. W. Rep. 344. And see *Beard v. Biley* (Colo. App.) 34 Pac. Rep. 271.

**SAME—EFFECT—REMEDIES.**

168. Fraud renders a contract, not void, but merely voidable at the option of the party injured. Therefore,

- (a) He may affirm the contract, and sue for damages for the deceit.
- (b) He may rescind the contract, and
  - (1) Sue for damages for the deceit;
  - (2) Sue to recover what he has parted with;
  - (3) Resist an action at law on the contract;
  - (4) Resist a suit in equity for specific performance, or
  - (5) Sue in equity to have the contract avoided judicially.

169. There are the following limitations to a party's right to rescind a contract for fraud:

- (a) He cannot rescind after affirming it by accepting its benefits, or by suing or otherwise acting upon it after discovery of the fraud.
- (b) Delay in rescinding after discovery of the fraud, or after it should have been discovered, may amount to an affirmation at law, and may bar relief in equity on the ground of laches.
- (c) The consideration must be returned as a condition precedent to the right to rescind; and, as a rule, there can be no rescission if the subject-matter of the contract has been so dealt with that the parties cannot be placed in statu quo.

**EXCEPTIONS—**(1) This rule does not apply where the consideration has been destroyed, or taken from the injured party's control, without his fault.

- (2) Where it is of no value whatever.
- (3) Provided the consideration is returned, the fraudulent party need not be placed in as good a position as he before occupied, if,

by reason of his own act, it is impossible to do so.

(4) If, by natural causes, or reasonable use, the value of the consideration has diminished, it may be returned in its depreciated condition.

(5) The defrauded party, on returning the consideration, may recover for what he has expended in its improvement before discovery of the fraud.

(d) The right to rescind may be defeated by a third person's having acquired an interest under the contract for value, and without notice of the fraud.

Fraud does not render the contract absolutely void, as is the case with mistake, but renders it voidable at the option of the party injured.<sup>148</sup> He therefore has several remedies on discovering the fraud:

First. He may affirm the contract, and bring an action for deceit to recover such damages as the fraud has occasioned him, or set

<sup>148</sup> *Baird v. Mayor*, 96 N. Y. 567; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; *Smith v. Horrback*, 4 Litt. (Ky.) 122; *Foreman v. Bigelow*, 4 Cliff. 541, Fed. Cas. No. 4,934. In many of the cases it is stated that fraud renders a contract void ab initio; but this is a careless use of words, and is apt to mislead. As we have seen, a contract which is void is of no effect whatever. If it has any effect, then it cannot be void. It is well settled, as we shall presently see, that bona fide purchasers from a fraudulent vendee acquire a title which cannot be defeated by the vendor's exercise of his right to rescind. His only remedy is against his vendee. It is also well settled that a person who has been induced by fraud to enter into a contract may waive the fraud and hold the other party to his bargain, or may hold the other party to his bargain, and also recover damages for the fraud; that he cannot rescind the contract if he delays for an unreasonable time, or acts upon it, with knowledge of the fraud; and that, as a rule, he will not be permitted to rescind unless the other party is placed in statu quo. This shows conclusively that a contract induced by fraud is not void. It is merely voidable until it is rescinded. When it is rescinded, it then, but not until then, becomes void ab initio as against the fraudulent party and all other persons except bona fide purchasers. See *Cobb v. Hatfield*, 46 N. Y. 533.

up such damages as a defense, or by way of counterclaim, if sued upon the contract by the other party.<sup>149</sup> For instance, if the seller of goods makes a fraudulent representation concerning them, the buyer, on discovering the fraud, may keep the goods, and bring an action for damages;<sup>150</sup> or, if he has not paid for them, he may set up such damages as a defense or counterclaim when sued by the seller for the price.<sup>151</sup>

Second. He may rescind the contract, and (1) sue, in the same manner as if he had affirmed it, for any damages he may have sustained by reason of the fraud;<sup>152</sup> or (2) he may sue to recover property obtained from him by the other party under the contract;<sup>153</sup> (3) or he may resist an action at law brought against him on the contract; or (4) he may resist a suit in equity by the other party for specific performance;<sup>154</sup> or (5) he may himself sue in equity to have the contract judicially canceled and set aside.<sup>155</sup>

#### *Limitations to Right to Rescind.*

There are, however, certain limitations to a man's right to rescind a contract on the ground of fraud. In the first place, as a rule, he must elect to rescind within a reasonable time after discovering the fraud,<sup>156</sup> or, what amounts to the same thing, after he could have

<sup>149</sup> *Union Cent. Ins. Co. v. Scheidler*, 130 Ind. 214, 29 N. E. Rep. 1071; *Peck v. Brewer*, 48 Ill. 54; *Haven v. Neal*, 43 Minn. 315, 45 N. W. Rep. 612; *Griffing v. Diller*, 68 Hun. 633, 21 N. Y. Supp. 407.

<sup>150</sup> *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 323.

<sup>151</sup> *Applegarth v. Robertson*, 65 Md. 493, 4 Atl. Rep. 896.

<sup>152</sup> *Wardell v. Fosdick*, 13 Johns. (N. Y.) 325; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. Rep. 551; *Peck v. Brewer*, 48 Ill. 54.

<sup>153</sup> *Thurston v. Blanchard*, 22 Pick. (Mass.) 18; *Lee v. Burnham*, 82 Wis. 209, 52 N. W. Rep. 255; *Moody v. Blake*, 117 Mass. 23; *Cary v. Hotelling*, 1 Hill (N. Y.) 311; *Benesch v. Weil*, 69 Md. 276, 14 Atl. Rep. 666; *Barker v. Dinsmore*, 72 Pa. St. 427.

<sup>154</sup> *Ratliff v. Vandikes*, 89 Va. 307, 15 S. E. Rep. 864; *Friend v. Lamb*, 152 Pa. St. 529, 25 Atl. Rep. 577; *McShane v. Hazelhurst*, 50 Md. 107; *Chute v. Quincy*, 155 Mass. 189, 30 N. E. Rep. 550; *Brown v. Pitcairn* (Pa. St.) 24 Atl. Rep. 52.

<sup>155</sup> *Castle v. Kemp*, 124 Ill. 307, 16 N. E. Rep. 255; *Downing v. Wherrin*, 19 N. H. 9; *Burrows v. Wene* (N. J. Ch.) 26 Atl. Rep. 890; *Williams v. Kerr*, 152 Pa. St. 560, 25 Atl. Rep. 618; *Jackson v. Hodges*, 24 Md. 468; *Tretheway v. Hulett*, 52 Minn. 448, 54 N. W. Rep. 486.

<sup>156</sup> *Johnson v. McLane*, 7 Blackf. (Ind.) 501; *Schiffer v. Dietz*, 83 N. Y. 300;

discovered it by the use of due diligence.<sup>157</sup> It has been said that he may keep the contract open until the other party sues upon it, and then rescind by simply setting up the fraud in defense; and that mere lapse of time, in the absence of statutory regulation, will not bar his right to rescind, though it would be evidence tending to show an intention to affirm;<sup>158</sup> but this is a little too broad a statement. A delay in rescinding which is unreasonable in view of the particular circumstances will generally be regarded, even at law, as an election to affirm,<sup>159</sup> and will bar relief in equity on the ground of laches.<sup>160</sup> If, after discovering the fraud, the party injured acts on the contract by accepting some benefit under it, or otherwise, he affirms it, and cannot afterwards rescind, for after an affirmance it is too late to rescind.<sup>161</sup> Bringing an action on the contract, or otherwise seeking to enforce it, after knowledge of the

*Strong v. Strong*, 102 N. Y. 69, 5 N. E. Rep. 799; *Bailey v. Fox*, 78 Cal. 389, 20 Pac. Rep. 808; *Young v. Arntze*, 86 Ala. 116, 5 South. Rep. 253; *Pence v. Langdon*, 99 U. S. 578; *Taylor v. Short*, 107 Mo. 384, 17 S. W. Rep. 970; *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. Rep. 415; *Wilbur v. Flood*, 16 Mich. 40; *Roemer v. Conlan*, 52 N. J. Law, 53, 18 Atl. Rep. 858; *Clements v. Smith*, 9 Gill (Md.) 156; *Foley v. Crow*, 37 Md. 62. Delay alone, without discovery of the fraud, will not bar the right to rescind either at law or in equity. *Smith v. Smith*, 30 Vt. 139; *Brown v. Norman*, 65 Miss. 369, 4 South. Rep. 203; *Bowman v. Patrick*, 36 Fed. Rep. 138.

<sup>157</sup> *Redgrave v. Hurd*, 20 Ch. Div. 1; *Georgia Pac. R. Co. v. Brooks*, 66 Miss. 583, 6 South. Rep. 467.

<sup>158</sup> *Anson*, Cont. 154; *Clough v. London & N. W. R. Co.*, L. R. 7 Exch. 35; *Wicks v. Smith*, 21 Kan. 412.

<sup>159</sup> *Masson v. Bond*, 1 Denio (N. Y.) 69; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. Rep. 636; *Carroll v. People*, 13 Ill. App. 206; note 156, *supra*.

<sup>160</sup> *Cox v. Montgomery*, 36 Ill. 396; *Hall v. Fullerton*, 69 Ill. 448; *Eberstein v. Willetts*, 134 Ill. 101, 24 N. E. Rep. 907; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. Rep. 636; *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. Rep. 507; *Barnard v. Roane Iron Co.*, 85 Tenn. 139, 2 S. W. Rep. 21; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. Rep. 643; *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. Rep. 228; *Lynch v. Vanneman* (N. J. Ch.) 18 Atl. Rep. 468.

<sup>161</sup> *Grymes v. Sanders*, 93 U. S. 55; *Dennis v. Jones* (N. J. Err. & App. 14 Atl. Rep. 913; *Pence v. Langdon*, 99 U. S. 578; *Lockwood v. Fitts*, 90 Ala. 150, 7 South. Rep. 467; *Crooks v. Nippolt*, 44 Minn. 239, 46 N. W. Rep. 349; *Troup v. Appleman*, 52 Md. 456; *Wyeth v. Walzl*, 43 Md. 426; *Cobb v. Hatfield*, 46 N. Y. 533; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. Rep. 785; *Thompson v. Fuller*, 16 N. Y. Supp. 486; *Bach v. Tuch*, 126 N. Y. 53, 20 N. E. Rep. 1019.



fraud, is an affirmance, which will prevent a subsequent rescission.<sup>162</sup> It is otherwise if an action is brought, or the contract otherwise acted upon, in ignorance of the fraud.<sup>163</sup> As already stated, an affirmance of the contract is no bar to an action to recover damages for the deceit.<sup>164</sup>

*Return of Consideration—Placing in Statu Quo.*

The contract must be rescinded in toto; it cannot be rescinded in part and affirmed in part.<sup>165</sup> As a rule, therefore, it is a condition precedent to the right to rescind a contract on the ground of fraud that the party seeking to rescind shall return, or offer to return, what he has received under the contract;<sup>166</sup> and generally, if the

<sup>162</sup> *Bach v. Tuch*, supra; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. Rep. 346; *Goodall v. Stewart*, 65 Miss. 157, 3 South. Rep. 257; *Bryan Shoe Co. v. Block*, 52 Ark. 458, 12 S. W. Rep. 1073; *Mansfield v. Wilson* (Ark.) 13 S. W. Rep. 598; *Myers v. Taber* (Sup.) 7 N. Y. Supp. 857; *Bedier v. Reaume*, 95 Mich. 518, 55 N. W. Rep. 306; *Kimball v. Cunningham*, 4 Mass. 502; *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. Rep. 827; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. Rep. 1006.

<sup>163</sup> *Lee v. Burnham*, 82 Wis. 209, 52 N. W. Rep. 255; *Equitable Co-op. Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. Rep. 487; *Underhill v. Ramsey* (Sup.) 2 N. Y. Supp. 451; *Hoyt Manuf'g Co. v. Turner*, 84 Ala. 523, 4 South. Rep. 658; *Rochester Dist. Co. v. Devendorf* (Sup.) 25 N. Y. Supp. 200; *Baker v. Maxwell* (Ala.) 14 South. Rep. 468.

<sup>164</sup> *Ante*, p. 348; *Gilchrist v. Manning*, 54 Mich. 210, 19 N. W. Rep. 959; *Mattock v. Reppy*, 47 Ark. 148, 14 S. W. Rep. 546; *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. Rep. 790; *Childs v. Merrill*, 63 Vt. 463, 22 Atl. Rep. 626; *Union Cent. Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. Rep. 1071; *Wabash Val. Prot. Un. v. James* (Ind. App.) 35 N. E. Rep. 919; *Teachout v. Van Hoesen*, 76 Iowa, 113, 40 N. W. Rep. 90.

<sup>165</sup> *Brill v. Rack* (Ky.) 23 S. W. Rep. 511; *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. Rep. 716; *Barrie v. Earle*, 143 Mass. 1, 8 N. E. Rep. 639; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. Rep. 785; *ante*, p. 253. And see the cases cited in the following notes.

<sup>166</sup> *Brown v. Norman*, 65 Miss. 369, 4 South. Rep. 293; *Estabrook v. Swett*, 116 Mass. 303; *Cobb v. Hatfield*, 46 N. Y. 533; *Thompson v. Peck*, 115 Ind. 512, 18 N. E. Rep. 16; *Francis v. Railroad Co.*, 108 N. Y. 93, 15 N. E. Rep. 192; *Jones v. Anderson*, 82 Ala. 302, 2 South. Rep. 911; *Smith v. Doty*, 24 Ill. 163; *Becker v. Trickel*, 80 Wis. 484, 50 N. W. Rep. 406; *Babcock v. Case*, 61 Pa. St. 427; *Young v. Arntze*, 86 Ala. 116, 5 South. Rep. 253; *Carneal v. May*, 2 A. K. Marsh. (Ky.) 587; *Doughten v. Camden, B. & L. Ass'n*, 41 N. J. Eq. 556. 7 Atl. Rep. 479; *Evans v. Gale*, 17 N. H. 573; *Cookingham v. Dusa*, 41 Kan.

subject-matter has been so dealt with, even before discovery of the fraud, that the parties cannot be reinstated in their former position, the court will not allow a rescission, but will leave the matter to be adjusted by an action for damages by the party injured, or defense or counterclaim in an action by the other party.<sup>107</sup>

This rule, however, is subject to exceptions, not only in equity, but also in actions at law. The defrauded party need not return what he has received if it has been destroyed, or taken from his control, without fault on his part,<sup>108</sup> or if it is absolutely of no value whatever.<sup>109</sup> Nor need he place the other party in the position which he before occupied, if, by reason of the latter's act, it is impossible to do so. All that can be required is that he return what

229, 21 Pac. Rep. 95; *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. Rep. 1053; *Blair v. Taylor* (Ind. Sup.) 36 N. E. Rep. 269; *Freeman v. Kiefer* (Cal.) 35 Pac. Rep. 707; *Leake v. Ball*, 116 Ind. 214, 17 N. E. Rep. 918; *Regensburg v. Notestine*, 2 Ind. App. 97, 27 N. E. Rep. 108. The vendor need not restore the vendee's note given for goods fraudulently purchased, before rescinding the sale and suing for the goods, whether the note is negotiable or not, if it remains in the vendor's hands and is produced at the trial. *Thurston v. Blanchard*, 22 Pick. (Mass.) 18; *Ryan v. Brant*, 42 Ill. 86; *Nichols v. Michael*, 23 N. Y. 264.

<sup>107</sup> *Curtiss v. Howell*, 39 N. Y. 211; *Neal v. Reynolds*, 38 Kan. 432, 16 Pac. Rep. 785; *Rigdon v. Walcott*, 141 Ill. 649, 31 N. E. Rep. 158; *Stanton v. Hughes*, 97 N. C. 318, 1 S. E. Rep. 852; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. Rep. 634.

<sup>108</sup> *Neblett v. Macfarland*, 92 U. S. 101; *Flynn v. Allen*, 57 Pa. St. 482; *Hammond v. Pennock*, 61 N. Y. 145; *Henninger v. Heald* (N. J. Eq.) 26 Atl. Rep. 449; *Groff v. Hansel*, 33 Md. 161.

<sup>109</sup> *Fitz v. Bynum*, 55 Cal. 459; *Wicks v. Smith*, 21 Kan. 412; *Babcock v. Case*, 61 Pa. St. 427. In a Massachusetts case, however, it is said: "The demandant contends that the stocks were worthless, and therefore it was unnecessary, as it would be useless, to return them. Such, unquestionably, is the rule of law if they were absolutely of no value to either party. But it is not sufficient that they were of no intrinsic value, or of no market value. If they were capable of serving any purpose of advantage by their possession or control, or if their loss was a disadvantage to the tenant in any way, he was entitled to have them returned. This rule is held with great strictness in actions at law, as in the case of the casks that contained worthless lime (*Connor v. Henderson*, 15 Mass. 319), and the sack that covered the rejected bale of cotton (*Morse v. Brackett*, 98 Mass. 205, 104 Mass. 494)." *Bassett v. Brown*, 105 Mass. 558. And see *Evans v. Gale*, 17 N. H. 573.

he has himself received.<sup>170</sup> Restoration of what has been received by the defrauded party "is not exacted on account of any feeling of partiality or regard for the fraudulent party. The law cares very little what his loss may be, and exacts nothing for his sake. If, therefore, he has so entangled himself in the meshes of his own knavish plot that the party defrauded cannot unloose him, the fault is his own; and the law only requires the injured party to restore what he has received, and, as far as he can, undo what had been done in the execution of the contract. This is all that honesty and fair dealing require of him. If these fail to extricate the wrongdoer from the position he has assumed in the execution of the contract, it is in no sense the fault of his intended victim, and, upon the principles of eternal justice, whatever consequences may follow, they should rest on the head of the offender alone."<sup>171</sup> If, by natural causes or reasonable use, the value of the property is diminished, the fraudulent party must receive it in its depreciated condition;<sup>172</sup> and, if the party defrauded has expended work, money, or material in the improvement of the property before discovering the fraud, he may restore the property, and recover for what he has expended.<sup>173</sup> In the two latter cases there is a restitution of the thing itself to the fraudulent party; but the status quo is not restored, for in the one case he receives the property back less valuable than it was, and in the other he takes it improved in value, but possibly improved in a manner or to an extent he would not have desired; but in neither case can he complain.

*Same—As against Third Persons.*

Further than this, the right to rescind may be terminated if innocent third persons acquire an interest under the contract. Where fraud is used to induce the owner of goods to sell them, an innocent third person may acquire rights of which no subsequent avoidance of the contract by the defrauded party can divest him. A sale of land or goods procured by fraud cannot be rescinded so as to revest

<sup>170</sup> *Masson v. Bovet*, 1 Denio (N. Y.) 69; *Hammond v. Pennock*, 61 N. Y. 145; *Guckenheimer v. Angevine*, 81 N. Y. 394.

<sup>171</sup> *Masson v. Bovet*, *supra*.

<sup>172</sup> *Baker v. Lever*, 67 N. Y. 304; *Gatling v. Newell*, 9 Ind. 574; *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. Rep. 329.

<sup>173</sup> *Farris v. Ware*, 60 Me. 482.

the property in the vendor, if the vendee has in the meantime sold them to a bona fide purchaser. The seller's remedy is by an action for damages.<sup>174</sup> It is otherwise if the purchaser did not pay a valuable consideration, or if he had notice of the fraud.<sup>175</sup>

There is, according to some courts, an exception to this rule where the fraud goes, not to the quality of the goods or the circumstances of the sale, but to the identity of the person contracted with. It has been held, as we have seen, that if a person is induced to send goods to one man under the impression that he is contracting with another, the sale is absolutely void, and not merely voidable, and a bona fide purchaser of the goods from the person to whom they are sent acquires no title.<sup>176</sup>

So, if the possession, only, of the property is obtained by the vendee, and not the title, the sale may be rescinded, even as against an innocent purchaser from the vendee, for, if the vendee has no title, he cannot give title.<sup>177</sup> Where the sale is intended to be for cash, and the title is not to pass until the price is paid, the vendee, though he has procured possession of the goods, can, before payment of the price, convey no title to a third person which will defeat the vendor's

<sup>174</sup> *Babcock v. Lawson*, 4 Q. B. Div. 394; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; *Hoffman v. Noble*, 6 Metc. (Mass.) 68; *Neff v. Landis*, 110 Pa. St. 204, 1 Atl. Rep. 177; *Dettra v. Kestnar*, 147 Pa. St. 506, 23 Atl. Rep. 889; *Le Grand v. Bank*, 81 Ala. 123, 1 South. Rep. 460; *Moore v. Moore*, 112 Ind. 149, 13 N. E. Rep. 673; *Jones v. Christian*, 86 Va. 1017, 11 S. E. Rep. 984; *Armstrong v. Lewis*, 38 Ill. App. 104; *First Nat. Bank v. Carriage Co.* (Miss.) 12 South. Rep. 598; *Schwartz v. McCloskey* (Pa. Sup.) 27 Atl. Rep. 300; *Scheuer v. Goetter* (Ala.) 14 South. Rep. 774; *Hall v. Hinks*, 21 Md. 406; *Lincoln v. Quynn*, 68 Md. 290, 11 Atl. Rep. 848; *Higgins v. Lodge*, 68 Md. 220, 11 Atl. Rep. 846.

<sup>175</sup> *Knowles v. Lord*, 4 Whart. (Pa.) 500; *Root v. French*, 13 Wend. (N. Y.) 570; *Thompson v. Rose*, 16 Conn. 71; *Parker v. Conner*, 93 N. Y. 118; note 184, *infra*. For a collection of cases, see notes to *Thurston v. Blanchard*, 33 Am. Dec. 702; *Cary v. Hotelling*, 1 Hill (N. Y.) 311; *Root v. French*, 13 Wend. (N. Y.) 570.

<sup>176</sup> *Cundy v. Lindsay*, 3 App. Cas. 465. This, however, is more properly on the ground of mistake as to the identity of the party. Some courts hold that the contract is voidable only on the ground of fraud. *Ante*, p. 203.

<sup>177</sup> *Cochran v. Stewart*, 21 Minn. 435; *Rohrbough v. Leopold*, 68 Tex. 254, 4 S. W. Rep. 460. But see *Smith v. Clews*, 105 N. Y. 283, 11 N. E. Rep. 632.

right to rescind.<sup>178</sup> In a New York case it was said that no title passes to the vendee of goods where he obtains them by acts amounting to a felony, though the felony is the obtaining of goods by false pretenses.<sup>179</sup> This case cannot be sustained on principle, nor, it is believed, on authority. Larceny cannot be committed by a vendee where the vendor intends to transfer the title,<sup>180</sup> but is committed where the possession, only, is obtained by fraud,—*animo furandi*,—the title remaining in the vendor; and therefore, if a person obtains goods by larceny, he cannot convey title to an innocent third person. If he obtains the title to goods, as well as the possession, by fraud, he commits the crime of obtaining goods by false pretenses.<sup>181</sup> Though guilty of a felony, he has the title, and there seems to be no good reason why he cannot transfer it to a bona fide purchaser so as to vest the title in him.<sup>182</sup>

As a rule, if a negotiable instrument is procured by fraud, the party intending to sign it as such, so that there is no mistake as to the character of the instrument, it cannot be avoided on the ground of the fraud after it has passed into the hands of a bona fide purchaser for value;<sup>183</sup> but, as we have seen, it is otherwise where, by fraud or circumvention, a person is induced to sign a negotiable instrument, when he does not intend to sign it, but thinks he is signing something else, provided, of course, he is not guilty of such negligence as will estop him from setting up his mistake.\*

<sup>178</sup> *Kinsey v. Leggett*, 71 N. Y. 387; *Dean v. Yates*, 22 Ohio St. 388; *Decan v. Shipper*, 85 Pa. St. 239.

<sup>179</sup> *Andrews v. Dieterich*, 14 Wend. (N. Y.) 31.

<sup>180</sup> *Clark*, Cr. Law, 248-257.

<sup>181</sup> *Clark*, Cr. Law, 278.

<sup>182</sup> *Cochran v. Stewart*, 21 Minn. 435.

<sup>183</sup> *Clark v. Thayer*, 105 Mass. 216; *Smith v. Livingston*, 111 Mass. 342; *Southwick v. First Nat. Bank*, 84 N. Y. 420; *Gridley v. Baue*, 57 Ill. 520; *Ormsbee v. Howe*, 54 Vt. 182.

\*There is much confusion in the cases on this point. Some of them, in holding that, if a person, not guilty of negligence, is induced by fraud to sign a negotiable instrument under the belief that it is something else, the instrument is "void," even in the hands of a bona fide holder for value, base the invalidity on the ground of fraud; but on principle there is no ground for this, nor is it necessary. If a person is so induced to sign an instrument which he does not intend to sign, there is a mistake as well as fraud. Mistake

The third party, in order to defeat the right to rescind, must be a bona fide purchaser; that is, a purchaser who parts with something of value on the faith of the apparent title and right of the vendee, or the holder of the negotiable instrument, as the case may be. A pre-existing creditor of the vendee or holder, who takes the property or the instrument in payment of his debt, either by voluntary transfer, or by process of law, as by attachment or execution, does not alter his position to his prejudice, and is not regarded as a purchaser for value.<sup>124</sup>

### DURESS.

170. Duress is actual or threatened violence or imprisonment, by reason of which a person is reasonably forced to enter into a contract. To affect the contract, however,

- (a) It must have been against or of the contracting party, or his or her wife, husband, parent, child, or other very near relative.
- (b) It must have been inflicted or threatened by the other party to the contract, or by one acting with his knowledge or on his behalf.
- (c) It must have induced the party to enter into the contract.

171. OF GOODS—By the weight of modern authority, the unlawful detention of another's goods under oppressive circumstances, or their threatened destruction, may constitute duress.

renders a contract void, while fraud renders it voidable. It is more proper, therefore, to base the invalidity of the instrument on the ground of the mistake. See ante, p. 291.

<sup>124</sup> *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. Rep. 201; *Root v. French*, 13 Wend. (N. Y.) 570; *Ratcliffe v. Sangston*, 18 Md. 383; *Barnard v. Campbell*, 58 N. Y. 73; *Stevens v. Brennan*, 79 N. Y. 254; *Fletcher v. Drath*, 66 Mo. 126; *Poor v. Woodburn*, 25 Vt. 235; *Sargent v. Sturm*, 23 Cal. 359; *Atwood v. Dearborn*, 1 Allen (Mass.) 483; *Thompson v. Rose*, 16 Conn. 71; *Devoe v. Brandt*, 53 N. Y. 462. Nor is an assignee of the vendee for the benefit of creditors a bona fide purchaser. He stands in the shoes of the assignor. *Nichols v. Michael*, 23 N. Y. 264; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. Rep. 101; *Benesch v. Well*, 69 Md. 276, 14 Atl. Rep. 666.

**172. EFFECT**—A contract entered into by a person under duress is voidable at his option, and not void. It may therefore, as in the case of fraud, be ratified or disaffirmed, and third persons may innocently acquire rights under it before disaffirmance.

Duress is a species of fraud. It means some actual or threatened personal violence against, or imprisonment of, a person, or of his very near relative, by reason of which he is forced or induced to enter into a contract. As we shall presently see more at length, it is of two kinds: (a) Duress of imprisonment,—that is, where the person is actually imprisoned; and (b) duress per minas,—that is, where he is threatened with imprisonment or personal violence. The ground upon which a contract entered into under duress can be avoided is because there is no real consent. The apparent consent is unreal because of the imprisonment or force, or of the fear caused by the threats. "Actual violence," it has been said, "is not necessary to constitute duress, \* \* \* because consent is the very essence of a contract; and, if there be compulsion, there is no actual consent; and moral compulsion, such as that produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. 'Duress,' in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness."<sup>185</sup>

<sup>185</sup> *Brown v. Pierce*, 7 Wall. 205; *Foshay v. Ferguson*, 5 Hill. (N. Y.) 154; *Eadie v. Slimmon*, 26 N. Y. 12; *U. S. v. Huckabee*, 16 Wall. 432; *French v. Shoemaker*, 14 Wall. 314; *Miller v. Miller*, 68 Pa. St. 496; *Guillaume v. Rowe*, 94 N. Y. 268; *Harmon v. Harmon*, 61 Me. 227; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Baker v. Morton*, 12 Wall. 150; *Gotwalt v. Neal*, 25 Md. 434; *Bane v. Detrick*, 52 Ill. 19; *Alexander v. Pierce*, 10 N. H. 494; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. Rep. 502; *Horton v. Bloedorn* (Neb.) 56 N. W. Rep. 321. A threat by a husband to separate from his wife and not support her has been held such duress as to avoid a deed by her to him induced thereby. *Tapley v. Tapley*, 10 Minn. 448 (Gil. 360). An angry command by husband to wife, unaccompanied by threats of personal violence, held not duress. *Gab-*

This dictum and the dicta of many other cases seem to require that the violence or threats shall have been sufficient to overcome a mind of "ordinary firmness," or the mind of a person of "ordinary courage," but such a proposition is incorrect, and there is probably no actual decision to sustain it. "The law of contracts considers the quality of the contracting mind, and therefore holds the apparent, yet unreal, consent of a subject or timid person, or person of inferior intellect, as invalid as that of the strongest and most independent understanding, though the latter would not have been enthralled where the former was."<sup>186</sup>

It is almost needless to add that the contract must have been made because of the imprisonment, or of fear of the threatened injury or imprisonment; otherwise, there is no duress.<sup>187</sup>

*Duress per Minas.*

Duress per minas, as defined at common law, is where a person is forced to enter into a contract (a) from fear of loss of life; (b) from fear of loss of limb; (c) from fear of mayhem; (d) from fear of imprisonment,—and there is no doubt but that threats of such injuries will constitute duress.<sup>188</sup> Many of the modern English de-

bey v. Forgens, 38 Kan. 62, 15 Pac. Rep. 806. Merely to speak roughly to a woman, without threats of personal violence, is not duress. Dausch v. Crane, 109 Mo. 323, 19 S. W. Rep. 61. Mere vexation and annoyance is not duress. Brower v. Callender, 105 Ill. 88.

<sup>186</sup> Bish. Cont. § 719, and cases cited.

<sup>187</sup> Feller v. Green, 26 Mich. 70; Flanigan v. City of Minneapolis, 36 Minn. 406, 31 N. W. Rep. 359; Schwartz v. Schwartz, 29 Ill. App. 516; Whitefield v. Longfellow, 13 Me. 146; Alexander v. Pierce, 10 N. H. 494; Bosley v. Shanner, 26 Ark. 280; Stono v. Weiller, 10 N. Y. Supp. 828; Post v. Bank, 138 Ill. 559, 28 N. E. Rep. 978.

<sup>188</sup> 3 Bac. Abr. "Duress," 252; Baker v. Morton, 12 Wall. 150; and cases hereafter cited. Threat of personal violence. Brown v. Pierce, 7 Wall. 205; Baker v. Morton, supra; Magoon v. Reber, 76 Wis. 392, 45 N. W. Rep. 112; Anderson v. Anderson, 26 N. Y. Supp. 492. Threat of criminal prosecution and imprisonment. Foshay v. Ferguson, 5 Hill (N. Y.) 154; 2 Co. Inst. 483; Co. Litt. 253b; Eadie v. Slimmon, 26 N. Y. 9; Whitefield v. Longfellow, 13 Me. 146; Bane v. Detrick, 52 Ill. 19; James v. Roberts, 18 Ohio, 548; Baldwin v. Hutchison (Ind. Sup.) 35 N. E. Rep. 711; Maricle v. Brooks (Sup.) 5 N. Y. Supp. 210; Morrison v. Faulkner, 80 Tex. 128, 15 S. W. Rep. 797; Landa v. Obert, 78 Tex. 33, 14 S. W. Rep. 207; Winfield Nat. Bank v. Croco, 46 Kan. 620, 20 Pac. Rep. 939. See post, p. 358, and cases cited. A threat to "make



cisions restrict the operation of the rule within the limits mentioned. They deny that contracts procured by menace of a mere battery to the person can be avoided on that ground; and the reason assigned for this rule is that such threats are not of a nature to overcome the mind and will of a firm and prudent man, because, it is said, if such an injury is inflicted, sufficient and adequate redress can be obtained in a suit at law.<sup>189</sup> There are cases to the same effect in this country, and some of the text writers have adopted the old rule.<sup>190</sup>

On the other hand, there are American decisions which adopt a more liberal rule, and hold that contracts procured by threats and fear of battery to the person may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance. There is wanting the free consent which is an essential element of contract.<sup>191</sup>

#### *Duress of Imprisonment.*

Imprisonment is any restraint of a person's liberty, whether it be in prison or elsewhere. It is well settled that any unlawful imprisonment, whatever may be the ground of illegality, constitutes duress, and avoids a contract entered into by the person imprisoned for the purpose of regaining his liberty.<sup>192</sup> Under the old common law, the imprisonment must have been illegal; lawful imprisonment, whatever might be the circumstances, was not regarded as duress;<sup>193</sup> and this rule seems to have been strictly adhered to in some of the modern cases.<sup>194</sup> By the overwhelming

complaint" and send the person threatened to prison, is not duress, where the threats do not specify an offense for which imprisonment may be had. *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. Rep. 679.

<sup>189</sup> 2 Co. Inst. 483; *Shep. Touch.* 6; post, p. 360.

<sup>190</sup> 1 Pars. Cont. 393.

<sup>191</sup> *Pierce v. Brown*, 7 Wall. 205; *Foshay v. Ferguson*, 5 Hill (N. Y.) 154; *Love v. State*, 78 Ga. 60, 3 S. E. Rep. 803.

<sup>192</sup> *Osborn v. Robbins*, 36 N. Y. 365; *Guilcaume v. Rowe*, 94 N. Y. 268; *Stepney v. Lloyd*, Cro. Ellz. 647, *Ewell*, Lead. Cas. 700; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Alexander v. Pierce*, 10 N. H. 494; *Whitefield v. Longfellow*, 13 Me. 146; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Bowker v. Lowell*, 49 Me. 429; *Tilley v. Damon*, 11 Cush. (Mass.) 247.

<sup>193</sup> 2 Co. Inst. 483; *Shep. Touch.* 6.

<sup>194</sup> *Clark v. Turnbull*, 47 N. J. Law, 265; *Kelsey v. Hobby*, 16 Pet. 260; *Taylor v. Cottrell*, 16 Ill. 93; *Heaps v. Dunham*, 95 Ill. 583.

weight of modern authority, however, the rule has been so far modified that now even a legal imprisonment will constitute duress if the process is sued out maliciously and without probable cause, or if it is sued out with probable cause, but for an unlawful purpose; as, for instance, where a legal arrest for crime is procured for the purpose of coercing payment of a private demand, or if the imprisonment, though legal, is made unjustly oppressive.<sup>195</sup> All the courts agree, however, that if the imprisonment is lawful, and there is no abuse of process, there is no duress.<sup>196</sup>

The rule that the imprisonment must be unlawful applies equally to duress per minas, where the threat is of imprisonment. A threat of unlawful arrest and imprisonment is duress,<sup>197</sup> but, as a rule, a threat of lawful imprisonment is not. A threat, for instance, by a creditor, to bring a suit against his debtor, and procure his arrest therein, is not duress where the creditor may lawfully so proceed.<sup>198</sup>

<sup>195</sup> *Watkins v. Baird*, 6 Mass. 506; *Richardson v. Duncan*, 3 N. H. 508; *Seiber v. Price*, 26 Mich. 518; *Taylor v. Cottrell*, 16 Ill. 93; *Schommer v. Farwell*, 56 Ill. 542; *Severance v. Kimball*, 8 N. H. 386; *Shaw v. Spooner*, 9 N. H. 197; *Hackett v. King*, 6 Allen (Mass.) 58; *Taylor v. Jacques*, 106 Mass. 291; *Mayer v. Oldham*, 32 Ill. App. 233; *Eadie v. Slimmon*, 26 N. Y. 9; *Strong v. Grannis*, 26 Barb. (N. Y.) 124; *Osborn v. Robbins*, 36 N. Y. 365; *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. Rep. 741; *Holbrook v. Cooper*, 44 Mich. 373; *Meek v. Atkinson*, 1 Bailey (S. C.) 84; *Shenk v. Phelps*, 6 Ill. App. 612; *Bane v. Detrick*, 52 Ill. 19; *Work's Appeal*, 59 Pa. St. 444; *Phelps v. Zuschlog*, 34 Tex. 371; *Holmes v. Hill*, 19 Mo. 150; *Foley v. Greene*, 14 R. I. 618; *Meadows v. Smith*, 7 Ired. Eq. (N. C.) 7; *Town of Sharon v. Gager*, 46 Conn. 189; *Hullborst v. Scharner*, 15 Neb. 57, 17 N. W. Rep. 259.

<sup>196</sup> *Soule v. Bouney*, 37 Me. 128; *Prichard v. Sharp*, 51 Mich. 432, 16 N. W. Rep. 798; *Feton v. Gregory*, 130 Mass. 176; *Grimes v. Briggs*, 110 Mass. 446; *Taylor v. Cottrell*, 16 Ill. 93; *Rood v. Winslow*, 2 Doug. (Mich.) 71; *Nealey v. Greenough*, 25 N. H. 325; *Smith v. Atwood*, 14 Ga. 402; *Slouffer v. Latshaw*, 2 Watts (Pa.) 165; *State v. Such*, 53 N. J. Law, 351, 21 Atl. Rep. 852; *Meek v. Atkinson*, 1 Bailey (S. C.) 84; *Stebbins v. Niles*, 25 Miss. 267, 349; *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. Rep. 714. A marriage cannot be avoided on the ground of duress where a man is lawfully arrested on process for seduction, and marries the woman to procure his discharge; and the fact that he subsequently discovers that he could not have been convicted will not alter the case, if the prosecution was on probable cause, and not from malice merely. *Marvin v. Marvin*, 52 Ark. 425, 12 S. W. Rep. 875. And see *Medrano v. State* (Tex. Cr. App.) 22 S. W. Rep. 684.

<sup>197</sup> Ante, p. 357, note 188.

<sup>198</sup> *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. Rep. 76; *Clark v. Turnbull*, 47 N. J. Law, 265; *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. Rep. 272.

It has also been said, without qualification, that, if a person has been wronged by the embezzlement or other criminal act of another, it is not duress to threaten him with a criminal prosecution, and thereby coerce him into giving a note, or otherwise settling for the injury.<sup>199</sup> As we have seen, however, a strictly legal imprisonment procured for the purpose of enforcing a private demand is an abuse of process, and constitutes duress; and on the same principle it has been held duress to threaten imprisonment for such a purpose.<sup>200</sup>

### *Duress of Goods.*

At common law, as we have seen, it was essential that duress should be threatened or applied to the person, and it was held, for the reasons stated in speaking of threats of battery, that a promise was not given under duress if made in consideration of the release of goods from unlawful destruction or detention; and there is modern authority to the same effect.<sup>201</sup> Most courts, however, have established a more liberal rule, and regard duress of goods under oppressive circumstances as sufficient to avoid a contract.<sup>202</sup> Duress

<sup>199</sup> *Eddy v. Herrin*, 17 Me. 338; *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. Rep. 272; *Taylor v. Cottrell*, 16 Ill. 93; *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. Rep. 1102; *Thorn v. Pinkham*, 84 Me. 103, 24 Atl. Rep. 718; *Weber v. Barrett*, 125 N. Y. 18, 25 N. E. Rep. 1068; *Compton v. Bank*, 96 Ill. 301.

<sup>200</sup> See *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. Rep. 1010, and 29 N. E. Rep. 525; *Adams v. Bank*, 116 N. Y. 600, 23 N. E. Rep. 7; *Miller v. Bryden*, 84 Mo. App. 602; *Morrison v. Faulkner*, 80 Tex. 128, 15 S. W. Rep. 797; *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. Rep. 946; *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. Rep. 1008; *Bryant v. Peck*, 154 Mass. 400, 28 N. E. Rep. 678; *Lighthall v. Moore*, 2 Colo. App. 554, 31 Pac. Rep. 511; *Thompson v. Niggley* (Kan.) 35 Pac. Rep. 290; *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. Rep. 741.

<sup>201</sup> *Atlee v. Backhouse*, 3 Mees. & W. 633; *Skeate v. Beale*, 11 Adol. & E. 983; *Hazelrigg v. Donaldson*, 2 Metc. (Ky.) 445.

<sup>202</sup> *Spalds v. Barrett*, 57 Ill. 289; *Loneragan v. Buford*, 148 U. S. 581, 13 Sup. Ct. Rep. 684; *Foshay v. Ferguson*, 5 Hill (N. Y.) 154; *Sasportas v. Jennings*, 1 Bay (S. C.) 470; *Harmony v. Bingham*, 12 N. Y. 99; *Tutt v. Ide*, 3 Blatchf. 249, Fed. Cas. No. 14,275b; *Astley v. Reynolds*, 2 Strange. 915; *U. S. v. Huckabee*, 10 Wall. 432; *White v. Heylman*, 34 Pa. St. 142; *Notz v. Mitchell*, 91 Pa. St. 114; *Miller v. Miller*, 68 Pa. St. 486; *Pemberton v. Williams*, 87 Ill. 15; *Scholey v. Mumford*, 60 N. Y. 498; *McPherson v. Cox*, 86 N. Y. 472; *Collins v. Westbury*, 2 Bay (S. C.) 211; *Chandler v. Sanger*, 114 Mass. 364; *Crawford v. Cato*, 22 Ga. 594; *Bennett v. Ford*, 47 Ind. 264; *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. Rep. 569; *McCormick v. Dalton* (Kan.) 35

in this connection must not be confounded with want of consideration. If the detention were obviously without right, the promise would be void because of want of consideration; if the right were doubtful, the promise might be supported by a compromise.

Pac. Rep. 113. A note given, or money paid, to obtain the release of goods from an attachment which has been fraudulently obtained, may, under some circumstances, be avoided or recovered back. *Chandler v. Sanger*, supra; *Collins v. Westbury*, supra; *Spalds v. Barrett*, supra; *Nelson v. Suddarth*, 1 Hen. & M. (Va.) 350. But it has been held that seizure of property claimed by A. under an attachment against B. is not duress of A. *Kingsbury v. Sargent*, 83 Me. 230, 22 Atl. Rep. 105. So, also, where a note is given, or money is paid, to prevent a seizure of property under execution fraudulently obtained, *Thurman v. Burt*, 53 Ill. 129; or under a warrant for the collection of an illegal tax or assessment, *Boston & S. Glass Co. v. City of Boston*, 4 Metc. (Mass.) 181; *Bruecher v. Village of Port Chester*, 101 N. Y. 240, 4 N. E. Rep. 272; *Bradford v. City of Chicago*, 25 Ill. 411. Exactions by carrier before delivery of property. *Beckwith v. Frisbie*, 32 Vt. 559; *Tutt v. Ide*, supra; *Harmony v. Bingham*, supra. Refusal by carrier to transport freight. *Little Rock & Ft. S. Ry. Co. v. Cravens*, 57 Ark. 112, 20 S. W. Rep. 803. Refusal by carrier to carry stock which has been loaded on the cars, unless the shipper will sign a special contract. *Atchison R. Co. v. Dill*, 48 Kan. 210, 29 Pac. Rep. 148. Refusal by banker to honor check unless fraudulent claim is acceded to, held duress. *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. Rep. 21. Threat to file mechanic's lien. *Gates v. Dundon* (City Ct. N. Y.) 18 N. Y. Supp. 149. Exactions by customs officer as a condition to the delivery of property. *Maxwell v. Griswold*, 10 How. 242; *Elliott v. Swartwout*, 10 Pet. 137. The mere refusal of a debtor to pay his debt does not amount to duress of goods, even though the creditor may be in straitened circumstances, and may need the money. *Hackley v. Headley*, 45 Mich. 569, 8 N. W. Rep. 511; *Secor v. Clark*, 117 N. Y. 350, 22 N. E. Rep. 754; *Cable v. Foley*, 45 Minn. 421, 47 N. W. Rep. 1135; *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. Rep. 21. *Doyle v. Church*, 133 N. Y. 372, 31 N. E. Rep. 221. Threat of civil action not duress. *McClair v. Wilson*, 18 Colo. 82, 31 Pac. Rep. 502. Nor does a suit against a person to recover his land from him amount to duress, *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. Rep. 115; nor a threat, by one holding an option to purchase land, to sue the owner for a deed, and "ruin him with costs," *Whitaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. Rep. 507; nor threats by a creditor to sue on the debt, and pursue the debtor to insolvency, *Wilson S. M. Co. v. Curry*, 126 Ind. 161, 25 N. E. Rep. 896. A threat to levy an attachment or execution has been held not to constitute duress. *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11; *Stover v. Mitchell*, 45 Ill. 213. Threats to prevent clearance of vessel, with power to carry out the threats, is duress of the ship's master. *Baldwin v. Timber Co.*, 63 Hun, 625, 20 N. Y. Supp. 496. And see *McPherson v. Cox*, supra.

*Against Whom.*

The subject of the duress must be the contracting party, or his or her wife, husband, parent, child, or other very near relative. A contract entered into in order to relieve a third person not standing in such a relationship would not be voidable on the ground of duress.<sup>203</sup> It should be noted, however, that a simple contract, the consideration for which is the discharge of a third person from illegal imprisonment, would be void for want of consideration.<sup>204</sup> Though the law, as just stated, does not regard a person as under duress who enters into a contract to relieve a stranger, it is otherwise where the person relieved is a very near relative, as a husband, wife, parent, or child.<sup>205</sup> These are the only relationships generally mentioned in the books, but there is no good reason why the rule should not also

<sup>203</sup> *Huscombe v. Standing*, Cro. Jac. 187; *Robinson v. Gould*, 11 Cr. sh. (Mass.) 55; *Plummer v. People*, 16 Ill. 358; *Phillips v. Henry* (Pa. Sup.) 28 Atl. Rep. 477; *Jones v. Turner*, 5 Litt. (Ky.) 147; *Wright v. Remington*, 41 N. J. Law, 48; *Spaulding v. Crawford*, 27 Tex. 155. A person's creditors cannot avoid his contract because of duress. *Lewis v. Bannister*, 16 Gray (Mass.) 500. A surety cannot avoid a common-law bond or note on the ground that his principal was under duress. *Huscombe v. Standing*, supra. Contra, *Strong v. Grannis*, 26 Barb. (N. Y.) 122. But it is otherwise in the case of statutory bonds, such as a bond given under a statute to release the principal from imprisonment, where the imprisonment is illegal. In such case the officer has no right to take the bond, and it is void. *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256. And see *State v. Brantley*, 27 Ala. 44; *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. Rep. 9; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Jones v. Turner*, 5 Litt. (Ky.) 147. But see *Plummer v. People*, 16 Ill. 358; *Huggins v. People*, 39 Ill. 246; *Inhabitants of Bordentown Tp. v. Wallace* (N. J. Sup.) 11 Atl. Rep. 267. Such a bond would be void for want of consideration in those jurisdictions where the consideration for a contract under seal can be inquired into. Ante, p. 175.

<sup>204</sup> Ante, p. 175.

<sup>205</sup> *Harris v. Carmody*, 131 Mass. 51; *Eadie v. Slimmon*, 26 N. Y. 9; *Shenk v. Phelps*, 6 Ill. App. 612; *Plummer v. People*, 16 Ill. 360; *First Nat. Bank v. Bryan*, 62 Iowa, 42, 17 N. W. Rep. 165; *Osborn v. Robbins*, 36 N. Y. 365; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. Rep. 8; *Brooks v. Berryhill*, 20 Ind. 97; *Southern Exp. Co. v. Duffey*, 48 Ga. 361; *Green v. Scranage*, 19 Iowa, 461; *McCormick Harvesting Mach. Co. v. Hamilton*, 73 Wis. 486, 41 N. W. Rep. 727; *Strang v. Peterson*, 56 Hun, 418, 10 N. Y. Supp. 139; *Adams v. Bank*, 116 N. Y. 606, 23 N. E. Rep. 7; *McClatchie v. Haslam*, 63 Law T. 376; *Meech v. Lee*, 82 Mich. 274, 46 N. W. Rep. 383; *Bryant v. Peck*, 154 Mass. 460, 28 N. E. Rep. 678.

extend to the relationships of brother, sister, grandparent, or grand-child, and indeed there are cases holding that it does so extend.<sup>206</sup>

*By Whom.*

Further than this, the duress, to be available as a defense, must have been inflicted or threatened by the other party to the contract, or by some one acting with his connivance.<sup>207</sup> A person entering into a contract with another under duress exercised by a third person may avoid the contract if the third person was the other party's agent, or if the other party knew the circumstances,<sup>208</sup> but not if he acted in good faith and without such knowledge.

*Effect.*

A contract is not void because it was entered into under duress, but, as in the case of fraud, is merely voidable at the option of the injured party, and stands unless he sees fit to avoid or rescind it. He may either ratify or disaffirm it, and may do so by his conduct.<sup>209</sup> The rules as to the right to rescind a contract for fraud apply with equal force here, and it is unnecessary to repeat them.

<sup>206</sup> *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. Rep. 946; *Bradley v. Irish*, 42 Ill. App. 85. It seems that it does not extend to master and servant. 1 Rolle, Abr. 687; Bac. Abr. "Duress," B; 2 Brownl. 276.

<sup>207</sup> 1 Rolle, Abr. 688; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. Rep. 596; *Fightmaster v. Levi* (Ky.) 17 S. W. Rep. 195; *Sherman v. Sherman* (Com. Pl. N. Y.) 20 N. Y. Supp. 414; *Compton v. Bank*, 96 Ill. 301; *Schwartz v. Schwartz*, 29 Ill. App. 516.

<sup>208</sup> *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. Rep. 596; *McClatchie v. Haslam*, 63 Law T. 376.

<sup>209</sup> *Miller v. Minor* (Mich.) 57 N. W. Rep. 101; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. Rep. 596; *Oregon Pac. R. Co. v. Forrest*, 128 N. Y. 83, 28 N. E. Rep. 137; *Veach v. Thompson*, 15 Iowa, 380; *Worcester v. Eaton*, 13 Mass. 371; *Lewis v. Bannister*, 16 Gray (Mass.) 500; *Belote v. Henderson*, 5 Cold. (Tenn.) 472; *Brown v. Peck*, 2 Wis. 261; *Deputy v. Stapleford*, 19 Cal. 302; *Everstein v. Willets*, 134 Ill. 101, 24 N. E. Rep. 967; *Doolittle v. McCollough*, 7 Ohio St. 299; *Schwartz v. Schwartz*, 29 Ill. App. 516; *Foerster v. Squier* (City Ct. N. Y.) 19 N. Y. Supp. 367; *Bush v. Brown*, 49 Ind. 577; *Sornborger v. Sanford*, 34 Neb. 496, 52 N. W. Rep. 368. A negotiable instrument, therefore, though executed under duress, is binding in the hands of a bona fide purchaser for value. *Hogan v. Moore*, 48 Ga. 156; *Clark v. Pease*, 41 N. H. 414. As to whether a sale of chattels or deed of land can be avoided as against a bona fide purchaser, the authorities are conflicting. That it can be avoided, see *Worcester v. Eaton*, 13 Mass. 369; *Belote v. Henderson*, 5 Cold. (Tenn.) 471. That it cannot, see *Deputy v. Stapleford*, 19 Cal. 302; *Cook v. Moore*, 39 Tex. 255.

### UNDUE INFLUENCE.

173. Undue influence is a species of fraud. It may be said generally to consist—

- (a) In the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.
- (b) In taking an unfair advantage of another's weakness of mind.
- (c) In taking a grossly oppressive and unfair advantage of another's necessities and distress.

174. EFFECT—Undue influence renders a contract voidable at the option of the injured party.

A person may be induced to enter into a contract, not only by specific fraudulent statements which would give rise to a common-law action of deceit, such as we have discussed under the head of "Fraud," but he may also be induced to contract by reason of circumstances placing it in the power of others to engage him in disadvantageous bargains and promises. Courts of equity have always given a wider interpretation to the term "fraud" than that adopted by the courts of common law. Looking beyond definite false and fraudulent statements, they have inferred from a long course of conduct, from the peculiar relations of the parties, or from the circumstances of one of them, that an unfair advantage has been taken of the promisor, and that his promise ought not, in equity, to bind him. The taking of such an unfair advantage is sometimes called "fraud," but it is more convenient, for the purpose of distinguishing it from the kind of fraud with which we have already dealt, to call it the "exercise of undue influence." It is difficult to give a clear and concise definition of "undue influence" because of the wide meaning of the term. The definition given in the black-letter text, and taken substantially from the proposed New York Code, is probably as good as can be framed without going beyond a mere definition.<sup>210</sup> Another good definition is given by an English judge,

<sup>210</sup> Proposed N. Y. Civ. Code, 231.

who, in speaking of the sort of cases "which \* \* \* raise, from the circumstances and conditions of the parties contracting, a presumption of fraud," says: "Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and, when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable."<sup>211</sup>

Before explaining the circumstances which the law regards as raising an inference of undue influence, it will be well to repeat a statement of the Michigan court, that "the line between due and undue influence, when drawn, must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as the claims of kindred, and, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice."<sup>212</sup> Neither in law nor in morals is a person standing in confidential relations to another prohibited from exerting any influence whatever to obtain a benefit to himself. The influence must be what the law regards as "undue influence." "Influence obtained by modest persuasion, and arguments addressed to the understanding, or by mere appeals to the affections, cannot properly be termed 'undue influence' in a legal sense;<sup>213</sup> but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will" of a person "to such an extent as to destroy the free agency,<sup>214</sup> or constrain him to do against

<sup>211</sup> Lord Selbourne, in *Earl of Aylesford v. Morris*, 8 Ch. 490; *Green v. Roworth*, 113 N. Y. 462, 21 N. E. Rep. 165; *Nelson's Will*, 30 Minn. 204, 39 N. W. Rep. 143.

<sup>212</sup> *Wallace v. Harris*, 32 Mich. 397.

<sup>213</sup> *Rogers v. Higgins*, 57 Ill. 244; *Wise v. Foote*, 81 Ky. 10; *Hale v. Cole*, 31 W. Va. 576, 8 S. E. Rep. 516; *Beith v. Beith*, 76 Iowa, 601, 41 N. W. Rep. 371; *Black v. Foljambre*, 39 N. J. Eq. 234; *Sturtevant v. Sturtevant*, 116 Ill. 340, 6 N. E. Rep. 428.

<sup>214</sup> *Latham v. Udell*, 38 Mich. 238; *Layman v. Conroy*, 60 Md. 230.



his will what he is unable to refuse, is such an influence as the law condemns as undue."<sup>215</sup>

*The Presumption from Circumstances.*

When it is said that equity presumes the exercise of undue influence from the circumstances, we mean that, when certain circumstances are shown to have existed, the court will, from that alone, hold that the contract was procured by undue influence, and will relieve the promisor unless the promisee assumes the burden of proof, and shows that everything was fair and just.<sup>216</sup> In some cases it is only necessary to show that the parties occupied a peculiar relation towards each other. The relation alone, being confidential, raises the presumption. In others, the confidential character of the relation must be shown. In others, want or inadequacy of consideration will raise the presumption.

Before going into these questions it will be well to repeat what has been said of the attitude of equity towards want or inadequacy of consideration. Four rules may be stated as having more or less bearing on the subject: (1) Equity will not enforce a gratuitous promise, even though it be under seal.<sup>217</sup> The acceptance of a voluntary donation throws upon the person who accepts it the necessity of proving that the transaction is just.<sup>218</sup> (3) Inadequacy of consideration is regarded as an element in raising the presumption of undue influence or fraud;<sup>219</sup> but (4) mere inadequacy of consideration alone, unless very gross, will not amount to proof of either.<sup>220</sup>

We may therefore frame the question we have to discuss somewhat in this way: When a man demands equitable remedies, either as plaintiff or defendant, seeking to escape the effects of a grant

<sup>215</sup> *Schofield v. Walker* (In re Disbrow's Estate) 58 Mich. 96, 24 N. W. Rep. 624.

<sup>216</sup> *Dent v. Bennett*, 4 Mylne & C. 269; *Cowee v. Cornell*, 75 N. Y. 91, at page 99; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. Rep. 331; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. Rep. 275; *Greenfield's Estate*, 14 Pa. St. 489; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. Rep. 119; *Sands v. Sands*, 112 Ill. 225; *Ward v. Armstrong*, 84 Ill. 151; *Zeigler v. Hughes*, 55 Ill. 283; *Jennings v. McConnel*, 17 Ill. 148; *Casey v. Casey*, 14 Ill. 112.

<sup>217</sup> *Kekewich v. Manning*, 1 De Gex, M. & G. 183.

<sup>218</sup> *Hoghton v. Hoghton*, 15 Beav. 209.

<sup>219</sup> *Wood v. Abrey*, 3 Madd. 423.

<sup>220</sup> *Coles v. Trecothick*, 9 Ves. 246; 2 Pom. Eq. Jur. 927.

which he has made gratuitously, or a promise which he has given upon a very inadequate consideration, what must he show, in addition to this, in order to raise the presumption that undue influence has been at work?

*Relationship of Parties—Parental and Quasi Parental Relation.*

One class of circumstances which will raise the presumption that undue influence was used in procuring another to enter into a contract is where the party benefited stood in some such relation to him as to render him peculiarly subject to influence. Parental or quasi parental relations subsisting between promisor and promisee, or grantor and grantee, will raise this presumption.<sup>221</sup> Where an orphan who had been living with her uncle for seven years became security for him soon after attaining her majority, it was said by the court, adverting to the fact that the security was obtained, through the influence of one standing in loco parentis, from the object of his protection and care: "This is a transaction which, under ordinary circumstances, this court will not allow. \* \* \* This court does not interfere to prevent an act, even of bounty, between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."<sup>222</sup> It will be seen from this case that the presumption of undue influence from parental or quasi parental relations does not cease as soon as the child becomes of age. It continues until there is such a complete emancipation that the judgment of the child is under no control.<sup>223</sup>

*Same—Other Family Relations.*

The term "parental relations" applies, not only to the actual relation of parent and child, and of one in loco parentis and child, but extends to husband and wife, brother and brother or sister, and to

<sup>221</sup> *Taylor v. Taylor*, 8 How. 183; *Archer v. Hudson*, 7 Beav. 560; *Miskey's Appeal*, 107 Pa. St. 611; *Noble's Adm'r v. Moses*, 81 Ala. 530, 1 South. Rep. 217; *Highberger v. Stiffler*, 21 Md. 338; *Berkmeyer v. Kellerman*, 32 Ohio St. 230; *Brown v. Burbank*, 64 Cal. 99, 27 Pac. Rep. 940; *Clutter v. Clutter* (Ky.) 4 S. W. Rep. 182. But see *Jenkins v. Pye*, 12 Pet. 241.

<sup>222</sup> *Archer v. Hudson*, 7 Beav. 560.

<sup>223</sup> *Post*, p. 370.

all cases in which one member of a family, from age, character, or circumstances, exercises a substantial preponderance of authority in the family councils.<sup>224</sup>

*Same—Fiduciary Relations.*

Persons standing in a fiduciary relation occupy a relation of confidence, and are within this equitable rule. A contract between a trustee and his cestui que trust,<sup>225</sup> or between a guardian and his ward,<sup>226</sup> is looked upon with suspicion. It is presumed that the trustee or guardian who is benefited by the promise of his cestui que trust or ward has used his peculiar position of confidence to his own advantage, and, in order that the contract may stand, he must show the contrary.

*Same—Other Confidential Relations.*

The power which a spiritual adviser may acquire over persons subject to his influence is also looked upon as raising the presumption of undue influence;<sup>227</sup> and to this may be added a number of other relations, such as attorney or solicitor and client,<sup>228</sup> and doc-

<sup>224</sup> *Green v. Roworth*, 113 N. Y. 402, 21 N. E. Rep. 165; *Harvey v. Mount*, 8 Beav. 439; *Graham v. Burch*, 44 Minn. 33, 46 N. W. Rep. 148; *Smyley v. Reese*, 53 Ala. 89; *Watkins v. Bryant*, 46 Wis. 419, 1 N. W. Rep. 82; *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. Rep. 843; *Styles v. Styles*, 14 Mich. 72; *Golding v. Golding*, 82 Ky. 51; *Boyd v. De La Montagnie*, 73 N. Y. 498; *Swiss-helm's Appeal*, 56 Pa. St. 475; *Hill v. Miller*, 50 Kan. 659, 32 Pac. Rep. 354; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540; *Brown v. Burbank*, 64 Cal. 99, 27 Pac. Rep. 940; *Worthington v. Major*, 94 Mich. 323, 54 N. W. Rep. 303.

<sup>225</sup> *Spencer's Appeal*, 80 Pa. St. 317; *Ward v. Armstrong*, 84 Ill. 151; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. Rep. 119; *Nichols v. McCarthy*, 53 Conn. 290, 23 Atl. Rep. 93; *McCants v. Bee*, 1 McCord, Ch. (S. C.) 333. Principal and agent. *Burke v. Taylor*, 94 Ala. 530, 10 South. Rep. 129.

<sup>226</sup> *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. Rep. 918; *Wickiser v. Cook*, 85 Ill. 68; *Wade v. Pulsifer*, 54 Vt. 45; *Hemphill v. Holford*, 88 Mich. 293, 50 N. W. Rep. 300; *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. Rep. 843; *Garvin v. Williams*, 44 Mo. 465, 50 Mo. 200.

<sup>227</sup> *Huguennin v. Baseley*, 14 Ves. 273; *Marx v. McGlynn*, 88 N. Y. 357; *Corrigan v. Pironi*, 48 N. J. Eq. 607, 23 Atl. Rep. 355; *Ross v. Conway*, 92 Cal. 632, 28 Pac. Rep. 785; *Finegan v. Theisen*, 92 Mich. 173, 52 N. W. Rep. 619; *Ford v. Hennesy*, 70 Mo. 580. Spirit medium's influence over believer in spiritualism. *Thompson v. Hawks*, 14 Fed. Rep. 902; *Connor v. Stanley*, 72 Cal. 556, 14 Pac. Rep. 306.

<sup>228</sup> *St. Leger's Appeal*, 34 Conn. 434; *Carter v. West* (Ky.) 19 S. W. Rep.

tor and patient.<sup>220</sup> The relations mentioned are not all.<sup>220</sup> The courts have not limited or defined the relations which they will regard as raising this presumption of influence, being more inclined to reserve to themselves the power of inquiring in each case, as it arises, whether influence was in fact exercised, than to reject the possibility of such exercise because the parties did not stand in certain special relations. The principle, it is said, applies to every case where "influence is acquired and abused, where confidence is reposed and betrayed."<sup>221</sup> Thus, where a young man who had just attained his majority incurred heavy liabilities to a person by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation, it was held that influence of this nature, though it could not be called parental, spiritual, or fiduciary, entitled the young man to the protection of the court. "It is not," it is said, "the relation of solicitor and client, or trustee and cestui que trust, which constitutes the sole title to relief in these cases, and which imposes upon those who obtain such securities as these the duty, before they obtain their confirmation, of making a free disclosure of every circumstance which it is important that the indi-

592; McGinn v. Tobey, 62 Mich. 252, 28 N. W. Rep. 818; Jennings v. McConnel, 17 Ill. 148; Zeigler v. Hughes, 55 Ill. 288; Ryan v. Ashton, 42 Iowa, 363.

<sup>220</sup> Audenreith's Appeal, 89 Pa. St. 114; Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. Rep. 275; Dent v. Bennett, 4 Mylne & C. 269; Blackie v. Clark, 15 Beav. 603; Cadwallader v. West, 48 Mo. 483; Watson v. Mahan, 20 Ind. 227.

<sup>221</sup> Dent v. Bennett, 4 Mylne & C. 269; Drake's Appeal, 45 Conn. 9; Boyd v. De La Montagnie, 73 N. Y. 498; Pierce v. Pierce, 71 N. Y. 154; Darlington's Appeal, 86 Pa. St. 512; Rockafellow v. Newcomb, 57 Ill. 186; Cadwallader v. West, 48 Mo. 483; Caspari v. Church, 82 Mo. 649; Allcord v. Skinner, 36 Ch. Div. 145. As to master and servant, Doran v. McConlogue, 150 Pa. St. 98, 24 Atl. Rep. 357.

<sup>222</sup> Sears v. Shafer, 6 N. Y. 268; Fisher v. Bishop, 108 N. Y. 25, 15 N. E. Rep. 331; Long v. Mulford, 17 Ohio St. 484; Leighton v. Ore, 44 Iowa, 679; Haydock v. Haydock, 34 N. J. Eq. 570; McCormick v. Mallin, 5 Blackf. (Ind.) 500; Todd v. Grove, 33 Md. 188; Cherbonnier v. Evitts, 56 Md. 276; Hansen v. Berthelson, 19 Neb. 433, 27 N. W. Rep. 423; McClure v. Lewis, 72 Mo. 314; Williams v. Collins, 67 Iowa, 413, 25 N. W. Rep. 682; Hanna v. Wilcox, 53 Iowa, 547, 5 N. W. Rep. 717; Sands v. Sands, 112 Ill. 225; Reed v. Peterson, 91 Ill. 298; Norris v. Tayloe, 49 Ill. 17; Casey v. Casey, 14 Ill. 112.

vidual who is called upon for the confirmation should be apprised of. The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the court of chancery most ordinarily deals are those of trustee and cestui que trust, and such like. It applies especially to those cases, for this reason, and for this reason only: that from those relations the court presumes confidence put and influence exerted, whereas, in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically. But, where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a court of equity, are just as applicable in the one case as the other."<sup>232</sup>

*Same—Continuance of Presumption.*

As already stated, the presumption of undue influence from the parental or quasi parental relation does not cease as soon as the child becomes of age and is emancipated in law. His judgment must also be emancipated. The confidential relation and consequent presumption of undue influence continues until the child is entirely released from any sort of control;<sup>233</sup> and the same principle applies to the relation of guardian and ward and the other confidential relations.<sup>234</sup>

*Mental Weakness.*

We have seen, in treating of the capacity of parties to enter into contracts, that the contract of a person who is non compos mentis is voidable because of his mental incapacity. We must now consider the effect of a less degree of mental incapacity. Mere weakness of intellect, not so great as to render the person non compos mentis, will not of itself affect the validity of a contract. A person may have been weak-minded by reason of old age or sickness, but will nevertheless be bound by his contract if he was capable of understanding its nature and effect, and no fraud or undue influence

<sup>232</sup> *Smith v. Kay*, 7 H. L. Cas. 750, 779. See, also, *Knott v. Tidyman* (Wis.) 56 N. W. Rep. 632.

<sup>233</sup> *Archer v. Hudson*, 7 Beav. 500; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. Rep. 918; *Noble's Adm'r v. Moses*, 81 Ala. 530, 1 South. Rep. 217; *Miller v. Simonds*, 72 Mo. 669.

<sup>234</sup> *Rhodes v. Bates*, L. R. 1 Ch. 252; *Mitchell v. Homfray*, 8 Q. B. Div. 537.

was practiced or exercised by the other party.<sup>225</sup> If, however, the other party has taken advantage of such weakness, and by the use of fraud and undue influence has made an unfair contract, it will be set aside.<sup>226</sup> This part of the subject runs, to some extent, into that treated in the following paragraph.

*Personal Influence Absent—Advantage Taken of Another's Necessities and Distress.*

The doctrine of undue influence has been extended to a class of cases from which the element of personal influence is altogether absent. They all appear to possess these common features, namely, that the promisor incumbers himself with heavy liabilities for the sake of a small gain, or, at any rate, an inadequate present gain; and the promisee takes advantage either of the improvidence and moral weakness, or else of the ignorance and unprotected situation, of the promisor, or, as stated in the proposed New York Code, takes an unfair advantage of the promisor's weakness of mind,<sup>227</sup> or of his necessities and distress.<sup>228</sup> The law has attempted by statute in some jurisdictions, as in case of the usury laws, to guard against advantage being taken against persons in such a situation, and courts of equity at one time adopted a rule that purchasers of any reversionary interest might always be called upon to show that they had given full value for their bargains, so that they might not take advantage of a man's present necessities to deprive him of his future estates without reasonable return.<sup>229</sup> The usury laws do not exist in all jurisdictions, and the rule as to reversionary interests

<sup>225</sup> Ante, p. 265.

<sup>226</sup> Norton v. Norton, 74 Iowa, 161, 37 N. W. Rep. 129; Tracy v. Sackett, 1 Ohio St. 54, 58; Rider v. Miller, 86 N. Y. 507; Morton's Adm'r v. Morton (N. J. Ch.) 8 Atl. Rep. 807; Oakley v. Ritchey, 69 Iowa, 69, 28 N. W. Rep. 448; Allore v. Jewell, 94 U. S. 506; Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. Rep. 383; Fishburne v. Ferguson's Heirs, 84 Va. 87, 4 S. E. Rep. 575; Moore v. Moore, 50 Cal. 89; McDaniel v. McCoy, 68 Mich. 332, 36 N. W. Rep. 84; Rippy v. Grant, 4 Ired. Eq. (N. C.) 443; Churchill v. Scott, 65 Mich. 485, 32 N. W. Rep. 737.

<sup>227</sup> Selden v. Myers, 20 How. 506.

<sup>228</sup> Moore v. Moore, 81 Cal. 195, 22 Pac. Rep. 589; Wooley v. Drew, 49 Mich. 290, 13 N. W. Rep. 594; McCants v. Bee, 1 McCord, Ch. (S. C.) 383.

<sup>229</sup> Chesterfield v. Jansen, 2 Ves. 125; 1 White & T. Lead. Cas. Eq. 423; Jenkins v. Pye, 12 Pet. 241.

has been, to a great extent, abrogated by statute in England, and is recognized in very few cases with us. If, however, a man, even in the absence of usury laws, takes advantage of the present poverty of an expectant heir to extort from him an exorbitant and ruinous rate of interest, he is liable to have the bargain set aside, and to be remitted to his claim for the amount of money he has actually advanced, with the current rate of interest upon it.<sup>240</sup> A man who bargains on terms of inequality as to age or knowledge with the promisee is entitled to the protection of a court of equity. "In ordinary cases," it is said, "each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of 'the expectant heir,' or of persons under pressure without adequate protection, and in the case of dealings with uneducated, ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract."<sup>241</sup> The court will look not merely to the acts of the parties, but to the reasonableness of the transaction under all the circumstances of the case; and if it appears that one has taken advantage of the unprotected condition of the other to drive a hard bargain, whether such condition arose from mental or moral weakness or ignorance, or from present necessity and distress, the transaction will not be allowed to stand.<sup>242</sup>

<sup>240</sup> *Aylesford v. Morris*, 8 Ch. 484. And see cases cited in note 242, *infra*. The mere fact, however, that exorbitant interest is charged does not show that the contract is unconscionable, where the parties are competent to contract, and there is neither fraud, nor oppression, nor advantage taken of a confidential relation. *Whittier v. Collins*, 15 R. I. 44. Where there is no actual fraud, and no fiduciary relation between the purchaser of a reversionary interest and his vendor, mere inadequacy of consideration is not sufficient to avoid the sale unless it is so great as to shock the moral sense. *Mayo v. Carrington*, 19 Grt. (Va.) 74; *Cribbins v. Markwood*, 13 Grt. (Va.) 495. And see *Parmelee v. Cameron*, 41 N. Y. 392; *Davidson v. Little*, 22 Pa. St. 245.

<sup>241</sup> *O'Rorke v. Bolingbroke*, 3 App. Cas. 823.

<sup>242</sup> *Benyon v. Cook*, 10 Ch. 389; *Hough v. Hunt*, 2 Ohio, 495; *Boynton v. Hubbard*, 7 Mass. 112; *Parsons v. Ely*, 45 Ill. 232; *Butler v. Duncan*, 47 Mich. 94, 10 N. W. Rep. 123; *Kelley v. Coplice*, 23 Kan. 337; *Jenkins v. Pye*, 12 Pet. 241; *Bacon v. Bonham*, 33 N. J. Eq. 614, 617; *Mastin v. Marlow*, 65 N. C. 695.

Another case in which this rule has been applied is in the case of a sale of the equity of redemption by a mortgagor to the mortgagee. The sale may be avoided by the mortgagor if any undue advantage was taken of his necessities. "Courts of law," it has been said, "as well as of equity, very frequently refuse to carry out the express agreements of parties when the result would be gross injustice to one, without any corresponding loss to the other, calling for such injustice. Especially should this be the case where an agreement made between mortgagor and mortgagee, or borrower and lender, is sought to be enforced or interposed as a defense. The law does and should scrutinize clearly all such agreements, and refuses to enforce them, especially where to do so would be both unjust and unconscionable."<sup>243</sup>

*Effect.*

The rules respecting the right to rescind contracts entered into under undue influence follow, so far as equity is concerned, the rules which apply to fraud,<sup>244</sup> but with one noticeable qualification. In the case of fraud, so soon as the fraud is discovered, the parties are placed on equal terms, and an affirmation of the contract binds the party who was originally defrauded; but in the case of undue influence it is not a particular statement, but a combination of circumstances, which constitutes the vitiating element in the contract, and unless it is clear that the will of the injured party is relieved from the dominant influence under which it has acted, or that the imperfect knowledge with which he entered into the contract is supplemented by the fullest assistance and information, an affirmation will not be allowed to bind him.<sup>245</sup> As in the case of duress, the undue influence must have been exercised by or with the cognizance of the other party.<sup>246</sup>

<sup>243</sup> *Dorrill v. Eaton*, 35 Mich. 302; *Butler v. Duncan*, 47 Mich. 94, 10 N. W. 123.

<sup>244</sup> *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. Rep. 622; ante, p. 346.

<sup>245</sup> *Maxon v. Payne*, 8 Ch. 881.

<sup>246</sup> *Dent v. Long*, 90 Ala. 172, 7 South. Rep. 640. Contra, where the other party has not paid a valuable consideration, *Graham v. Burch*, 44 Minn. 33, 46 N. W. Rep. 143.



## CHAPTER VIII.

### LEGALITY OF OBJECT.

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- 214-215. Conflict of Laws—In Space.
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### IN GENERAL.

**175. An agreement is not enforceable at law, and therefore does not result in a contract if its object is illegal.**

We come now to deal with the only remaining element in the formation of a valid contract,—the legality of the matter or object of the agreement. To result in a contract, an agreement must create an obligation; and it does not create an obligation if it is such that the courts cannot enforce it. An agreement, therefore, which

is illegal or unlawful, is in fact no contract at all, though it is often spoken of as an illegal contract.

As a rule the law does not interfere with the freedom of persons to enter into contracts, but some limitations are imposed. Certain objects are forbidden, and though all the other elements necessary to the formation of a valid contract may be present, yet if one of these forbidden objects is contemplated by the parties, the courts will not enforce their agreement. The object makes the agreement unlawful. It is often said that a promise will not be enforced if the consideration is illegal; but, inasmuch as the consideration for a promise is the object of one of the parties in entering into the contract, this rule is included in the rule that the object of the agreement must not be illegal.

#### CLASSIFICATION OF UNLAWFUL AGREEMENTS.

**176.** For convenience in treatment, unlawful agreements may be classified,<sup>1</sup> according to their matter or object, as

- (a) Agreements in violation of positive law; and
- (b) Agreements contrary to public policy.

The distinction here made between agreements in violation of positive law and agreements contrary to public policy is in the reasons which determine the law to hold the agreement void, and not in the nature or operation of the law itself. The nullity of the agreement itself is in every case a matter of positive law; but in one class of cases the acts contemplated by the agreement are expressly prohibited by the common law or by statute, so that there is no need to apply the test of public policy, while in the other the prohibition rests more particularly on public policy, or, as it is sometimes called, the "policy of the law." It is not always easy to distinguish between the two classes, for frequent decisions upon certain matters of public policy have established such definite rules regarding them that they are in effect express rules of the common law. Too much importance, therefore, must not be attached to any classification of the subject.

<sup>1</sup> Pol. Cont. 251.

**AGREEMENTS IN VIOLATION OF POSITIVE LAW.**

**177. Any agreement which involves the doing of an act which is positively forbidden by law, or, what amounts to the same thing, the omission to do an act which is positively enjoined by law, is illegal and void. Acts may be so prohibited or enjoined**

- (a) By express rules of the common law; or**
- (b) By statute.**

There are many acts which the law positively forbids or enjoins, and to the doing or omission of which some penalty is attached. Whether the prohibition or injunction is by the common law or by statute is altogether immaterial. The act or omission prohibited may be some grievous crime, such as murder or robbery, with the penalty of death or imprisonment in the penitentiary; or it may be some less heinous crime, such as an assault; or it may be an act or omission prohibited merely as a police regulation, as in the case of statutes regulating the sale of intoxicating liquors, or the conduct of a particular trade or business, with only a small fine as the penalty; or again it may be only a civil wrong, subjecting the doer merely to a civil action by the individual injured. All of these cases stand on the same footing. The prohibition is by positive law. If the subject-matter or object of an agreement is such that its performance would consist in an act or omission so forbidden, or be so connected therewith as to be in substance part of the same transaction, the courts will not enforce it.

**SAME—BREACH OF EXPRESS RULES OF COMMON LAW**

**178. The agreements which are illegal because they are in breach of express rules of the common law are:**

- (a) Agreements involving the commission of crime; and**
- (b) Agreements involving the commission of a civil wrong against an individual.**

This classification, like that in the preceding section, is, from the nature of the subject, only approximate, and only for convenience in the treatment of the subject. Many acts are prohibited by statute which were formerly prohibited by the common law, and which, but for the statute, would still be so prohibited. Again, many acts which are prohibited by the common law in one state are prohibited by statute in another, and in some states there are no common-law crimes at all. For this reason, in treating of agreements in breach of express rules of the common law we must include agreements in breach of statutes which are merely declaratory of the common law.

*Agreements Involving the Commission of Crime.*

The simplest instance of an agreement contrary to positive law is an agreement to commit a crime or indictable offense. Every agreement to commit a crime or indictable offense, either as the final object or as a means to an object which, except for such means, would be lawful, is illegal and void. "If one bind himself in an obligation to kill a man, burn a house, maintain a suit, or the like, it is void."<sup>2</sup> An agreement, therefore, to write, print, or publish a libelous book or article,<sup>3</sup> or an obscene book, article, or picture,<sup>4</sup> is void. And so it is with an agreement to commit an assault.<sup>5</sup> Not only are such agreements illegal and void, but the agreement itself is a crime known in the criminal law as a "conspiracy." The crime of conspiracy is also committed in some cases where it is agreed to commit some civil wrong; but the invalidity of such an agreement does not need to rest on its criminal character.

Where an agreement is obviously criminal, there can be no difficulty in pronouncing it illegal; but it may sometimes be difficult to determine whether a particular thing agreed to be done is or is not an offense, or whether a particular agreement is or is not, on a true construction of its terms, an agreement to commit an offense. The first of these questions must be determined by reference to the criminal law. The second is a question of interpretation of the con-

<sup>2</sup> Shep. Touch. 370.

<sup>3</sup> Shackell v. Rosler, 2 Bing. N. C. 634; Atkins v. Johnson, 43 Vt. 78; Arnold v. Clifford, 2 Sumn. 238, Fed. Cas. No. 555; Jewett Pub. Co. v. Butler, 159 Mass. 517, 34 N. E. Rep. 1087; post, p. 381.

<sup>4</sup> Poplett v. Stockdale, 1 Ryan & M. 337; Gale v. Leckie, 2 Starkie, 107.

<sup>5</sup> Allen v. Rescous, 2 Lev. 174.

tract. It cannot be out of place in this connection to repeat Sir Frederick Pollock's warning,—that whenever it is desired to contract for something which is not certainly lawful at the time, or the lawfulness of which depends on some event not within the control of the parties, the terms of the contract should make it clear that the thing is not to be done unless it becomes or is ascertained to be lawful.\*

At common law it is an indictable offense to compound a crime, that is, to agree not to prosecute it; and for this reason such an agreement is void as a violation of positive law,—of a law positively declaring it a crime. So, also, at common law, in England and in many of our states, it is a crime known as "maintenance" for a person to officiously intermeddle in a suit that in no way belongs to him, by maintaining or assisting either party, by money or otherwise, to prosecute or defend it; and it is a crime known as "champerty" for a stranger to make a bargain with a plaintiff or defendant to divide the land or other matter sued for between them, whereupon the champertor is to carry on the party's suit or defense at his own expense. These agreements, then, where they constitute a crime in themselves, may well be said to be unlawful and void on that ground alone, without looking into "the policy of the law."<sup>†</sup> The text-books, however, and most of the decisions, classify them as "agreements contrary to public policy;" and it will be better for us to follow them.

*Agreement to Commit Civil Wrong.*

An agreement will generally be illegal if it contemplates a civil wrong to a third person, though the wrong may not be an indictable offense, and though the agreement may not amount to the crime of conspiracy. An agreement to divide the profits of a fraudulent scheme, or to carry out some object in itself lawful, by means of a trespass, breach of contract, or breach of trust, is unlawful and void. The acts contemplated, though not necessarily criminal, are contrary to positive law.<sup>‡</sup>

\* Pol. Cont. 254.

<sup>†</sup> Of course it is on grounds of public policy that acts are punished as crimes at common law. Clark, Cr. Law, 1.

<sup>‡</sup> Scott v. Brown [1892] 2 Q. B. 724; Begbie v. Sewage Co., L. R. 10 Q. B. 491; Clement's Appeal, 52 Conn. 464; Allen v. Rescous, 2 Lev. 174; Hatch v.

*Same—Frauds on Creditors.*

Among the agreements void because they involve a civil wrong are agreements in fraud of creditors. A debtor, in the absence of statutory prohibition, may assign his property to a third person in trust for the benefit of his creditors, and may in good faith prefer certain creditors over others. The transaction, however, will be void if there is an intention to defraud creditors by hindering or delaying them in the collection of their claims, as where the debtor retains possession and control of the property, or reserves to himself some benefit or advantage.\*

So, also, in case of compositions with creditors, if in order to procure the consent of some particular creditor, or for any other reason, the debtor secretly promises him some advantage over the others, the agreement is void. In a composition with creditors, "each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void; not only can he take no advantage from it, but he is also to lose the benefit of the composi-

Mann, 15 Wend. (N. Y.) 44; *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. Rep. 331; *Davis v. Arledge*, 3 Hill (S. C.) 170; *McCall v. Capehart*, 20 Ala. 521; *Gleason v. Chicago, M. & St. P. R. Co.* (Iowa) 43 N. W. Rep. 517; *Woodstock Iron Co. v. Extension Co.*, 120 U. S. 643, 9 Sup. Ct. Rep. 402; *Huckins v. Hunt*, 138 Mass. 366; *Gray v. McReynolds*, 65 Iowa, 461, 21 N. W. Rep. 777; *Bloss v. Bloomer*, 23 Barb. (N. Y.) 604; *Jerome v. Bigelow*, 66 Ill. 452; *Thomas v. Caulkett*, 57 Mich. 392, 24 N. W. Rep. 154; note 207, *infra*. Where A. pays B. for goods for C., intending that C. shall not have to pay anything, and B. and C. secretly agree for a further payment by C., the agreement is void as a fraud on A. *Jackson v. Duchaire*, 3 Term R. 551. Perpetration of fraud on the public. *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. Rep. 331; *Jerome v. Bigelow*, 66 Ill. 452.

\* *Blacklock v. Doble*, 1 C. P. Div. 265; *Ogden v. Peters*, 21 N. Y. 23; *Knight v. Packer*, 12 N. J. Eq. 214; *Mackie v. Cairns*, 5 Cow. (N. Y.) 547; *Austin v. Bell*, 20 Johns. (N. Y.) 442; *Young v. Hall*, 6 Lea (Tenn.) 175; *Sommerville v. Horton*, 4 Yerg. (Tenn.) 541; *Haydock v. Coope*, 53 N. Y. 68; *Place v. Langworthy*, 13 Wis. 629; *Hubbard v. McNaughton*, 43 Mich. 220, 5 N. W. Rep. 293; *Bennett v. Ellison*, 23 Minn. 242.

tion."<sup>10</sup> In such a case the debtor can claim no benefit under the composition, even as against the creditor to whom the preference was given.<sup>11</sup>

*Same—Fraud in Connection with Sales at Auction.*

Where property is put up for sale at public auction, any agreement between the owner and third persons by which fictitious bids are to be made, so as to raise the price, is a fraud on the purchaser,<sup>12</sup> and no rights can be based upon it. A person, for instance, engaged to make fictitious bids, could not recover compensation promised him. We are here speaking of illegal agreements only, and therefore have nothing to do with the rights of the purchaser at an auction sale. His contract is not illegal. He can avoid it, but this is because of the fraud, not because of any illegality. The

<sup>10</sup> *Mullallen v. Hodgson*, 16 Q. B. 689; *Frost v. Gage*, 3 Allen (Mass.) 560; *Yeomans v. Chatterton*, 9 Johns. (N. Y.) 295; *Lawrence v. Clark*, 36 N. Y. 128; *Partridge v. Messer*, 14 Gray (Mass.) 180; *Ramsdell v. Edgerton*, 8 Metc. (Mass.) 227; *Clarke v. White*, 12 Pet. 178; *Bliss v. Matteson*, 45 N. Y. 22; *Kullman v. Greenebaum*, 92 Cal. 403, 28 Pac. Rep. 674; *Cobleigh v. Pierce*, 32 Vt. 788; *Cheveront v. Textor*, 53 Md. 295; *Sollinger v. Earle*, 82 N. Y. 393; *Hanover Nat. Bank v. Blake* (Sup.) 14 N. Y. Supp. 913; *Id.*, 20 N. Y. Supp. 780; *O'Shea v. Lead Co.*, 42 Mo. 397; *Way v. Langley*, 15 Ohio St. 392; *Bradley v. Lally* (City Ct. N. Y.) 21 N. Y. Supp. 1044; *Frieberg v. Treitschke*, 36 Neb. 880, 55 N. W. Rep. 273; *Hefter v. Cahn*, 73 Ill. 296; *Sternburg v. Bowman*, 103 Mass. 325; *Huckins v. Hunt*, 138 Mass. 366. It has been held, however, that the secret agreement, only, is void, and does not render the composition void. *Cheveront v. Textor*, 53 Md. 295. And it has even been held that the guilty creditor does not lose the right to receive his share. *White v. Kuntz*, 107 N. Y. 518, 14 N. E. Rep. 423. But see *Yeomans v. Chatterton*, 9 Johns. (N. Y.) 295, and other cases cited above.

<sup>11</sup> *Higgins v. Pitt*, 4 Exch. 312. A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge, or to a composition, is void; and it does not matter whether it was made with the debtor himself or with a stranger, *Higgins v. Pitt*, *supra*; *Kullman v. Greenebaum*, *supra*; nor whether the consideration offered to the creditor for such withdrawal is to come out of the debtor's assets or not, *Hall v. Dyson*, 17 Q. B. 785; *Kullman v. Greenebaum*, *supra*; and this is true though it may be part of the agreement not to prove against the estate at all, *McKewan v. Sanderson*, 20 Eq. 63.

<sup>12</sup> *Smith v. Greenlee*, 2 Dev. (N. C.) 126; *Moncrieff v. Goldsborough*, 4 Har. & McH. (Md.) 281; *Curtis v. Aspinwall*, 114 Mass. 187; *Peck v. List*, 23 W. Va. 338; *Pennock's Appeal*, 14 Pa. St. 446; *Staines v. Shore*, 16 Pa. St. 200.

illegality is in the agreement to commit the fraud. The sale is not illegal, but merely voidable at the purchaser's option.

In like manner agreements between persons for the purpose of deterring bidders and preventing competition at an auction sale are illegal as being a fraud on the owner, and the parties to such an agreement can claim no rights under it.<sup>13</sup> This rule, however, does not prevent parties from entering into a bona fide arrangement to purchase property at auction on their joint account, or for other proper purposes.<sup>14</sup>

"An agreement between two or more persons," it has been said, "that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character, and will be enforced; but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy, and in fraud of the just rights of the party offering it, and therefore illegal."<sup>15</sup>

#### *Same—Publication of Libel.*

Since it is a civil wrong to publish a libelous book or article, even when it does not constitute a crime, an agreement contemplating such a publication is illegal. No action will lie, therefore, to recover compensation for printing or publishing a libelous book, or

<sup>13</sup> *Gibbs v. Smith*, 115 Mass. 592; *Ray v. Mackin*, 100 Ill. 246; *Slingluff v. Eckel*, 24 Pa. St. 474; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Wilbur v. How*, 8 Johns. (N. Y.) 346; *Atcheson v. Mallon*, 43 N. Y. 147; *Barton v. Benson*, 126 Pa. St. 431, 17 Atl. Rep. 642; *Gardiner v. Morse*, 25 Me. 140; *Dudley v. Odom*, 5 S. C. 131; *Goldman v. Oppenheim*, 118 Ind. 95, 20 N. E. Rep. 635; *Baggott v. Sawyer*, 25 S. C. 405; *Lloyd v. Malone*, 23 Ill. 43; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. Rep. 124; *Wooten v. Hinkle*, 20 Mo. 290.

<sup>14</sup> *Gibbs v. Smith*, *supra*; *Smith v. Greenlee*, 2 Dev. (N. C.) 126; *Smith v. Ulman*, 58 Md. 183; *Phippen v. Stickney*, 3 Metc. (Mass.) 388; *Garrett v. Moss*, 20 Ill. 549; *Marie v. Garrison*, 83 N. Y. 14; *Smull v. Jones*, 1 Watts & S. (Pa.) 128; 6 Watts & S. (Pa.) 122; *Jenkins v. Frink*, 30 Cal. 586; *Switzer v. Skiles*, 3 Gilman (Ill.) 529; *Kearney v. Taylor*, 15 How. 494; *Wicker v. Hoppock*, 6 Wall. 94.

<sup>15</sup> *Gibbs v. Smith*, *supra*.



for breach of a contract to print or publish it, or on an agreement to indemnify against liability for publishing it.<sup>16</sup> In a late Massachusetts case an action was brought by a book publisher against Benjamin F. Butler for breach of a contract by the defendant to allow the plaintiff to publish a book which the defendant proposed to write. The defendant contended that the contract was illegal because of a provision therein that he should accept full responsibility of all matter contained in the work, and defend at his own costs any suits that might be brought against the plaintiff for publishing any statements contained in it, and pay all costs and damages arising from such suits. One of the judges thought that this provision rendered the contract illegal, but the majority of the court thought otherwise. In order to render such a contract illegal, it was said, "it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter; or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter; or that the contract on its face provided for or promoted an illegal act."<sup>17</sup>

*Same—Illegality Distinguished from Fraud.*

It will be well, in this connection, to explain a difficulty which sometimes arises from a confusion of illegality with fraud. Fraud is a civil wrong, and an agreement to commit a fraud is an agreement to do an illegal act; but fraud as a civil wrong must be kept apart from fraud as a vitiating element in contract. Fraud may vitiate a contract for a reason other than the fact that it constitutes a civil wrong, for, as we have seen, as between the parties to a contract, the fraud of one prevents the consent of the other from being genuine. In such a case the contract can be avoided by the party defrauded, not because the fraud is an illegality, but because his consent was unreal. If a party is induced to enter into a contract by the fraud of the other party, the contract is not void on the ground of illegality, but is voidable because the defrauded party

<sup>16</sup> *Shackell v. Rosier*, 2 Bing. N. C. 634; *Atkins v. Johnson*, 43 Vt. 78; *Arnold v. Clifford*, 2 Sumn. 238, Fed. Cas. No. 555; *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N. E. Rep. 1087; *Ives v. Jones*, 3 Ired. (N. C.) 538; *Clay v. Yates*, 1 Hurl. & N. 73.

<sup>17</sup> *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N. E. Rep. 1087. Lathrop, J., dissenting.

did not really consent, and there was in fact no agreement at all. If, on the other hand, parties enter into a contract, the object or effect of which is to defraud a third person, the contract is not merely voidable, but is void because the agreement is to do an unlawful act.

As we have just seen, a secret agreement by a debtor with one of his creditors to give him an advantage over the others is void as being illegal because of the fraud on the other creditors. The composition with the creditors is by some courts held voidable on account of the fraud, because the fraud prevented their consent from being genuine. So, also, an agreement between the owner of property sold at auction and a third person to puff up the price by fictitious bids is illegal as a fraud on the purchaser, and an agreement between bidders with the object of preventing competition is illegal as a fraud on the owner. The auction sale in neither case is illegal, but is voidable—in the first case at the option of the purchaser, and, in the second, at the option of the owner—because of the fraud.

This distinction between fraud as affecting the reality of consent and preventing any agreement at all, and fraud as rendering an actual agreement illegal, should be kept in mind.

#### **SAME — AGREEMENTS IN BREACH OF STATUTE — CONSTITUTIONAL LAW.**

**179.** The legislature has the power to prohibit or regulate the making of contracts if the public good requires the prohibition or regulation, but not otherwise.

In England parliament probably has unlimited power to impose restrictions on the freedom of individuals to enter into contracts; but with us there is some limit to the power of congress and of the state legislatures in this respect. The United States, or a state, in the exercise of its police power, may regulate or prohibit the making of contracts where, in the judgment of the legislature, the public good requires the restriction, and ordinarily the courts will not review its judgment as to the propriety of the law. There is, however, some limitation to the police power of the state or United States. The

federal constitution protects the vested rights of the people, and prohibits congress and the state legislatures from passing any law which shall deprive a citizen of his liberty or property without due process of law. The courts are bound to enforce the constitution, even as against the legislatures; and if the legislature, assuming to act under the police power of the state, should pass a statute depriving a person of the right to make contracts, where the public good clearly does not require such interference, the statute would be unconstitutional and void, and the courts would be bound to hold it so. In New York, for instance, a statute was held invalid which made it a misdemeanor for any person who should sell food to give away therewith, as a part of the transaction of sale, any other thing as a premium, gift, etc.<sup>18</sup> In Pennsylvania, a statute providing that the payment of wages of laborers in and about iron mills, etc., should be made at regular intervals, and in lawful money of the United States, was held unconstitutional as an unwarranted interference with the right to make contracts. The purpose of the statute was to prevent payment of wages in part by orders on stores.<sup>19</sup> So, also, in Michigan, a statute providing that no person engaged in the manufacture or sale of intoxicating liquors should become surety on another liquor dealer's bond has been held void on the ground that the right of a person to pledge his property was a vested right, of which he could not be deprived without due process of law.

<sup>18</sup> *People v. Gillson*, 109 N. Y. 389, 17 N. E. Rep. 343. See, also, *In re Jacobs*, 98 N. Y. 98, in which the tenement house cigar manufacturing act was held unconstitutional; *People v. Marx*, 99 N. Y. 377, 2 N. E. Rep. 29, in which an act absolutely prohibiting the manufacture and sale of oleomargarine was held invalid. In *State v. Scougal* (S. D.) 51 N. W. Rep. 858, a statute prohibiting any individual or firm from carrying on the business of banking, by discounting and negotiating promissory notes, etc., by receiving deposits, buying and selling exchange, coin, and bullion, and by loaning money on personal security, without first complying with the provisions of the act requiring an association to be formed of not less than three persons, one-third of whom shall be residents of the state, was held unconstitutional.

<sup>19</sup> *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. Rep. 254.

**SAME—THE PROHIBITION BY STATUTE.**

180. In determining whether an agreement is prohibited by a statute, the intention of the legislature must be ascertained, and must govern. The following general rules may be stated:

- (a) There is no distinction between *mala in se* and *mala prohibita*.
- (b) A penalty *prima facie* imports a prohibition.
- (c) Omission of a penalty does not alter an express prohibition.
- (d) What may not be done directly may not be done indirectly.
- (e) An agreement, though forbidden, is not void if the statute expressly so provides.
- (f) An agreement may be simply unenforceable, and not otherwise unlawful.
- (g) When conditions prescribed for the conduct of a business, trade, or profession are not complied with, agreements in the course of such business, trade, or profession, are
  - (1) Void, if the condition is for the benefit of the public, as for the maintenance of public order or safety, or the protection of persons dealing with those on whom it is imposed.
  - (2) Valid, if no specific penalty is attached to the specific transaction, and the condition is imposed simply for administrative purposes, such as the protection or convenient collection of the revenue.

Where it is contended that an agreement is illegal as being in violation of a statute which the legislature had the power to enact, the question, aside from an interpretation of the agreement itself, is whether the acts contemplated are prohibited by the statute;

and the answer to this question depends upon the construction of the statute. In all cases the intention of the legislature must be ascertained, and must govern.<sup>20</sup> If a statute was intended to prohibit a particular agreement, or the acts involved in its performance, then that agreement is clearly illegal. It is sometimes said that the policy of the statute is to be considered, but this can only be for the purpose of ascertaining the intention of the legislature. The courts cannot cut short or widen the effect of legislation according to their views of what ought to be the law. They can only seek for the intention of the legislature, and apply the law as they find it.<sup>21</sup>

*Mala in Se and Mala Prohibita.*

In respect to the validity of contracts, the law does not make any distinction between acts which are mala in se, and which for this reason are prohibited by statute, and acts which are mala prohibita, or wrong merely because they are prohibited by statute. After it has once been determined that a statute was intended to prohibit an act, we must hold that an agreement involving its commission is illegal, without regard to the ground of prohibition, or the morality or immorality of the act.<sup>22</sup> The distinction, however, as we shall presently see, may become important in determining the rights of the parties to an illegal agreement.

*Prohibition—Effect of Penalty.*

A statute may render an agreement illegal by express prohibition, or by imposing a penalty without an express prohibition. It may say in so many words that contracts of a certain sort are illegal or void, or both; and where it thus expressly avoids a contract, or declares it illegal, no doubt can arise as to the intention of the legisla-

<sup>20</sup> Cope v. Rowlands, 2 Mees. & W. 149; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. Rep. 884; Bowditch v. Insurance Co., 141 Mass. 292, 4 N. E. Rep. 798; Aiken v. Blaisdell, 41 Vt. 655; Griffith v. Wells, 3 Denio (N. Y.) 226; Harris v. Runnels, 12 How. 79; Pangborn v. Westlake, 36 Iowa, 546; Dillon v. Allen, 46 Iowa, 299; Lester v. Howard Bank, 33 Md. 558; Ruckman v. Bergholz, 37 N. J. Law, 437.

<sup>21</sup> Barton v. Muir, L. R. 6 P. C. 184.

<sup>22</sup> Bank of U. S. v. Owens, 2 Pet. 527, 539; Bensley v. Bignold, 5 Barn. & Ald. 335; Aubert v. Maze, 2 Bos. & P. 371; White v. Buss, 3 Cush. (Mass.) 448; Puckett v. Alexander, 102 N. C. 95, 8 S. E. Rep. 767; Penn v. Bornman, 102 Ill. 523; Lewis v. Welch, 14 N. H. 294.

ture. Where, however, the statute merely imposes a penalty upon the carrying out of the objects of an agreement, a question arises as to whether the penalty amounts to a prohibition. If it does, the agreement is illegal and void.

Some of the cases seem to hold, without any qualification, that, whenever a statute imposes a penalty for a particular act or omission, it impliedly prohibits it;<sup>23</sup> but, according to the weight of authority, the imposition of a penalty, though of great weight as showing an intention to prohibit, is only *prima facie* equivalent to a prohibition.<sup>24</sup> In the absence of anything further to show the intention of the legislature, the imposition of a penalty for the doing of an act will be held to amount to a prohibition of the act; but if it appears from the object of the penalty, and the manner in which it is imposed, that there was no intention to prohibit agreements violating the statute, they must be upheld. If the object of the penalty, it has been said, is to protect the public against fraud or imposition, or to protect the public health or morals, safety or good order, the statute amounts to a prohibition of acts in violation of it; but if, on the other hand, the penalty is imposed merely for administrative purposes, as for the protection or convenient collection of the revenue, an agreement in violation of the statute will generally be upheld.<sup>25</sup> This is the rule generally laid down, but it has been declared unsatisfactory.<sup>26</sup>

<sup>23</sup> *Miller v. Post*, 1 Allen (Mass.) 434; *Hallett v. Novlon*, 14 Johns. (N. Y.) 273, 290; *Pray v. Burbank*, 10 N. H. 377; *Doe v. Burnham*, 31 N. H. 426; *Durgin v. Dyer*, 68 Me. 143; *Cope v. Rowlands*, 2 Mees. & W. 149; *Kleckley v. Leyden*, 63 Ga. 215; *McConnell v. Kitchens*, 20 S. C. 430; *Bacon v. Lee*, 4 Iowa, 490.

<sup>24</sup> *Pol. Cont.* 270; *Bensley v. Bignold*, 5 Barn. & Ald. 335; *Cope v. Rowlands*, 2 Mees. & W. 149; *Griffith v. Wells*, 3 Denio (N. Y.) 226; *Bancroft v. Dumas*, 21 Vt. 456; *Hunt v. Knickerbocker*, 5 Johns. (N. Y.) 327; *Springfield Bank v. Merrick*, 14 Mass. 322; *Sledenbender v. Charles*, 4 Serg. & R. (Pa.) 150; *Penn v. Bornman*, 102 Ill. 523; *Lewis v. Welch*, 14 N. H. 294.

<sup>25</sup> *Pol. Cont.* 273; *Benj. Sales*, 432; *Larned v. Andrews*, 106 Mass. 435; *Smith v. Mowhood*, 14 Mees. & W. 452; *Aiken v. Blaisdell*, 41 Vt. 655; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. Rep. 299; *Ballay v. Harris*, 12 Q. B. 905; *Ruckman v. Bergholz*, 37 N. J. Law, 437.

<sup>26</sup> See *Territt v. Bartlett*, 21 Vt. 184; *Aiken v. Blaisdell*, 41 Vt. 655; *Cope v. Rowlands*, 2 Mees. & W. 149.

Sir William Anson states as the tests of prohibition, not only the purpose of the penalty, but also its continuity. His summary is substantially that, where a penalty is imposed by statute upon the carrying on of a trade or business in a particular manner, it may be assumed *prima facie* that agreements made in breach of such statutory provisions are illegal and void; that if the penalty is imposed, not for the benefit of the public in general but for the security of the revenue, it is possible that the agreement was only intended to be penalized and not prohibited; that if, in addition to this, it appears that the penalty is imposed once for all upon the offending person, and not upon each successive agreement in breach of the statute continuously, it is almost if not quite certain that agreements so made are not intended to be vitiated.<sup>27</sup>

*Same—Omission of Penalty.*

The imposition of a penalty by statute is only material in that it shows an intention on the part of the legislature to prohibit the act penalized. It is the prohibition, and not the penalty, that renders illegal agreements in violation of the statute. The absence of a penalty, therefore, or the failure of the penal clause in the particular instance, will not prevent the court from giving effect to an express prohibition.<sup>28</sup>

*Doing Indirectly What cannot be Done Directly.*

What the law forbids to be done directly cannot be made lawful by doing it indirectly.<sup>29</sup> Where a bank, for instance, which was itself prohibited from entering into a particular transaction, procured its manager to appear in the transaction for its benefit, it was held that the transaction was unlawful, "upon the principle that whatever is prohibited by law to be done directly cannot legally be

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<sup>27</sup> Anson, *Cont.* 173; *Brown v. Duncan*, 10 Barn. & C. 93; *Smith v. Mowhood*, 14 Mees. & W. 463; *Pangborn v. Westlake*, 36 Iowa, 546; *Johnson v. Hulings*, 103 Pa. St. 498; *Mandlebaum v. Gregorich*, 17 Nev. 87, 28 Pac. Rep. 121; *Favor v. Philbrick*, 7 N. H. 326; *Lewis v. Welch*, 14 N. H. 294; *Corning v. Abbott*, 54 N. H. 469; *Larned v. Andrews*, 106 Mass. 435; *Rather v. Bank*, 92 Pa. St. 393.

<sup>28</sup> *Pol. Cont.* 271; *Sussex Peerage Case*, 11 Clark & F. 148, 149.

<sup>29</sup> *Booth v. Bank of England*, 7 Clark & F. 509, 540; *Bank of U. S. v. Owens*, 2 Pet. 527, 536; *Wells v. People*, 71 Ill. 532.

effected by an indirect and circuitous contrivance.”<sup>20</sup> So, where the charter of a bank forbade the taking of a greater rate of interest than 6 per cent., but did not say that an agreement should be void in which such interest was taken, the supreme court of the United States held that a transaction by which the bank discounted a note at more than 6 per cent. was void, though the charter did not expressly prohibit an “agreement” to take higher interest, but spoke only of “taking,” not of “reserving,” interest. The court said: “A fraud upon a statute is a violation of the statute. \* \* \* It cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. In those instances in which courts are called upon to inflict a penalty \* \* \* it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offense; but, when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do.”<sup>21</sup>

*Same—Agreements Prohibited but Declared not Void.*

An agreement forbidden by statute may be saved from being void by the statute itself. Where a statute forbids an agreement, but says that, if made, it shall not be void, then, if made, it is a contract which the courts must enforce. It would seem that there should be no question as to this, but the point has been expressly raised and decided.<sup>22</sup>

*Same—Agreements Simply Void and Unenforceable.*

Where no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, neither the agreement itself nor its performance is to be treated as unlawful for any other purpose.<sup>23</sup>

<sup>20</sup> Booth v. Bank of England, *supra*.

<sup>21</sup> Bank of U. S. v. Owens, *supra*.

<sup>22</sup> Lewis v. Bright, 4 El. & Bl. 917.

<sup>23</sup> Post, p. 496.



**SAME—PARTICULAR AGREEMENTS IN BREACH OF  
STATUTE.**

181. Among the statutes prohibiting agreements, the following may be mentioned as the most important:

- (a) Statutes regulating the conduct of a particular trade, business, or profession, or regulating dealings in particular articles of commerce.
- (b) Statutes regulating the traffic in intoxicating liquors.
- (c) Statutes prohibiting labor, business, etc., on Sunday.
- (d) Statutes prohibiting the taking of usury.
- (e) Statutes prohibiting gaming and wagers. This head includes statutes prohibiting the buying and selling of stocks or commodities for future delivery, where the parties intend, not an actual delivery, but a settlement by paying the difference between the market and the contract price.<sup>34</sup>
- (f) Statutes prohibiting lotteries.

*Regulating Trade, Profession, or Business.*

There are numerous statutes in all of the states, enacted for the purpose of protecting the public in dealing with certain classes of traders or professional men, and with certain articles of commerce. Protection to the public is generally the object of these statutes, and they are construed as prohibiting contracts entered into without having complied with the prescribed conditions. As falling within this class may be mentioned statutes imposing a penalty on dealers who fail to have the weights, measures, or scales used by them approved and sealed by the proper officer. Such a statute is for the protection of the public against fraud and imposition, and amounts to a prohibition of sales in measures or by weights or scales

<sup>34</sup> Independently of statute, wagers on subjects in which the parties have no interest are, in this country, as we shall see, very generally held illegal, as being immoral, and contrary to public policy.

not sealed, so that a dealer who has made such a sale cannot recover the price.<sup>66</sup>

Falling within this class are also statutes requiring professional men, such as lawyers, physicians and surgeons, and others, to procure a license, certificate, or diploma as a condition precedent to the right to engage in the practice of their profession. These statutes are intended to protect the public against incompetent and unqualified practitioners, and a person coming within the statute cannot recover for his services if he has not complied with its provisions.<sup>67</sup>

There are also, in most of the states, statutes regulating dealings with certain articles of commerce. They are designed either for the protection of the public against fraud or imposition from the sale of a spurious article, or for the protection of the public health against adulterated articles of food, or dangerous substances, such as powder and poisons.<sup>67</sup> Sales of fertilizers, for instance, have

<sup>66</sup> *Miller v. Post*, 1 Allen (Mass.) 434; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. Rep. 299; *Flinch v. Barclay*, 87 Ga. 393, 13 S. E. Rep. 566; *Eaton v. Kegan*, 114 Mass. 433.

<sup>67</sup> *Lawyers*. *Hall v. Bishop*, 3 Daly (N. Y.) 109; *Ames v. Gilman*, 10 Metc. (Mass.) 239; *Hittson v. Brown*, 3 Colo. 304. But see *Yates v. Robertson*, 80 Va. 475; *Harland v. Lillenthal*, 53 N. Y. 438. *Physicians and surgeons*. *Bailey v. Mogg*, 4 Denio (N. Y.) 60; *Alcott v. Barber*, 1 Wend. (N. Y.) 526; *Orr v. Meek*, 111 Ind. 40, 11 N. E. Rep. 787; *Coyle v. Campbell*, 10 Ga. 570; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. Rep. 767; *Davidson v. Bohlman*, 37 Mo. App. 576; *Richardson v. Dorman*, 28 Ala. 679; *Fox v. Dixon* (Sup.) 12 N. Y. Supp. 267; *Downs v. Minchew*, 30 Ala. 86; *Jordan v. Dayton*, 4 Ohio, 295; *Holland v. Adams*, 21 Ala. 680; *Thompson v. Hazen*, 25 Me. 104; *Underwood v. Scott*, 43 Kan. 714, 23 Pac. Rep. 942; *Bibber v. Simpson*, 59 Me. 181; *Holmes v. Halde*, 74 Me. 28; *Dow v. Haley*, 30 N. J. Law, 354; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. Rep. 880; *Adams v. Stewart*, 5 Har. (Del.) 144; *Haworth v. Montgomery*, 91 Tenn. 16, 18 S. W. Rep. 399; *Hargan v. Purdy* (Ky.) 20 S. W. Rep. 432; *Roberts v. Levy* (Cal.) 31 Pac. Rep. 570. *Unlicensed real-estate broker*. *Buckley v. Humason*, 50 Minn. 195, 52 N. W. Rep. 385; *Johnson v. Hulings*, 103 Pa. St. 498; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. Rep. 230. *Unlicensed stockbroker*. *Cope v. Rowlands*, 2 Mees. & W. 149; *Hustis v. Pickards*, 27 Ill. App. 270. *School teacher without certificate*. *Ryan v. School Dist.*, 27 Minn. 433, 8 N. W. Rep. 146; *Wells v. People*, 71 Ill. 532. *Unqualified conveyancer*. *Taylor v. Gas Co.*, 10 Exch. 293.

<sup>67</sup> *Sale of oleomargarine*. *Waterbury v. Egan* (City Ct. N. Y.) 23 N. Y. Supp. 115; *Braun v. Keally*, 146 Pa. St. 519, 23 Atl. Rep. 389.

been held illegal where the article was not inspected or labeled as required by statute.<sup>38</sup>

In many of the states there are statutes prohibiting the employment of young children in factories, and a contract for such employment would be illegal, so that a father could not recover for the services of a child so employed.<sup>39</sup>

Further illustrations of statutes within this class are referred to below.<sup>40</sup>

*Same—Traffic in Intoxicating Liquors.*<sup>41</sup>

An important class of statutes falling under this head are statutes regulating the traffic in intoxicating liquors. In some cases it is the purpose of the legislature to prohibit sales of intoxicating liquors altogether; and there can be little difficulty in determining this intention, and declaring sales illegal. Some difficulty has arisen where the statute was not absolutely prohibitory, but merely prescribed certain conditions to be complied with by dealers. An example is where a statute imposes a penalty for selling without a license. It is generally held that such a statute is not merely for purposes of revenue, but is to diminish the evils of intemperance, and prevent disreputable and objectionable persons from engaging

<sup>38</sup> *McConnell v. Kitchens*, 20 S. C. 430; *Conley v. Sims*, 71 Ga. 161; *Wood v. Armstrong*, 54 Ala. 150; *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Johnston v. McConnell*, 65 Ga. 129; *Baker v. Burton*, 31 Fed. Rep. 401; *Williams v. Barfield*, Id. 398; *Campbell v. Segars*, 81 Ala. 259, 1 South. Rep. 714. *Contra*, *Niemeyer v. Wright*, 75 Va. 239.

<sup>39</sup> *Birkett v. Chatterton*, 13 R. I. 299.

<sup>40</sup> Loan by pawnbroker who has neglected to comply with statute. *Fergusson v. Norman*, 5 Bing. N. C. 76. Agreement to pay a printer for work where he has failed to print his name on the work as required by statute. *Bensley v. Bignold*, 5 Barn. & Ald. 335. Unlicensed peddlers. *Stewartson v. Lothrop*, 12 Gray (Mass.) 52. Agreement to construct a building not complying with the building regulations. *Stevens v. Gourley*, 7 C. B. (N. S.) 99; *Burger v. Roelsch* (Sup.) 28 N. Y. Supp. 460. Failure to measure wood sold, as required by statute. *Pray v. Burbank*, 10 N. H. 377. Agreement for threshing grain, where the machine is not boxed as required by a statute, intended to prevent injury to workmen on the machine. *Dillon v. Allen*, 46 Iowa, 299. Sale of shingles not of the size prescribed by statute. *Wheeler v. Russell*, 17 Mass. 258.

<sup>41</sup> On this subject, see *Black, Intox. Liq.* §§ 242-276.

in the business, and that sales without a license are prohibited and rendered illegal.<sup>43</sup>

Somewhat in line with these statutes are those which regulate the conduct of saloons and other places where intoxicating liquors are sold, such as statutes prohibiting billiard tables, bowling alleys, etc., in connection with a saloon. An agreement in breach of such a statute is illegal. A carpenter, for instance, cannot recover the price of erecting a bowling alley in a building appurtenant to a tavern, where a statute prohibits it from being so kept.<sup>44</sup>

So, also, under a statute imposing a penalty on any person owning or controlling any premises who shall suffer them to be used for the sale of spirituous liquors, a person who owns a building, and has knowledge that his tenant at will is using the premises for the sale of spirituous liquors, and who permits him to continue in possession, cannot recover for use and occupation.<sup>45</sup>

*Contracts in Breach of Sunday Laws.*

The common law does not prohibit the making of contracts on Sunday, and, in the absence of statutory prohibition, such contracts are as valid as if made on any other day.<sup>46</sup> In most states, however, statutes have been enacted on the subject, and it will be well to notice shortly some of the most general provisions.<sup>47</sup>

<sup>43</sup> *Griffith v. Wells*, 3 Denio (N. Y.) 226; *Territt v. Bartlett*, 21 Vt. 184; *Alken v. Blaisdell*, 41 Vt. 655; *O'Bryan v. Fitzpatrick*, 48 Ark. 487, 3 S. W. Rep. 527; *Vannoy v. Patton*, 5 B. Mon. (Ky.) 248; *Solomon v. Dreschler*, 4 Minn. 278 (Gil. 197); *Lewis v. Welch*, 14 N. H. 294; *Cobb v. Billings*, 23 Me. 470; *Melchoir v. McCarty*, 31 Wis. 252; *Briggs v. Campbell*, 25 Vt. 704; *Boutwell v. Foster*, 24 Vt. 485; *Bancroft v. Dumas*, 21 Vt. 456; *Bach v. Smith*, 2 Wash. T. 145, 3 Pac. Rep. 831.

<sup>44</sup> *Spurgeon v. McElwain*, 6 Ohio, 442.

<sup>45</sup> *Mitchell v. Scott*, 62 N. H. 596. And a person who lets a building with a view of its being used for the purpose of unlawful traffic in intoxicating liquors cannot recover the rent. Post, p. 481.

<sup>46</sup> *Story v. Elliott*, 8 Cow. (N. Y.) 27; *Sayles v. Smith*, 12 Wend. (N. Y.) 57; *Richmond v. Moore*, 107 Ill. 429; *Bloom v. Richards*, 2 Ohio St. 387; *Amis v. Kyle*, 2 Yerg. (Tenn.) 31; *Hellams v. Abercrombie*, 15 S. C. 110; *Swann v. Swann*, 21 Fed. Rep. 299; *Adams v. Gay*, 19 Vt. 358; *Brown v. Browning*, 15 R. I. 422, 7 Atl. Rep. 403.

<sup>47</sup> Sunday laws are not an unconstitutional interference with the religious liberty of the people. *State v. O'Rourke*, 35 Neb. 614, 53 N. W. Rep. 591;

Where the statute, as is sometimes the case, expressly prohibits the making of contracts on Sunday, and declares that they shall be void, there should be no difficulty in applying it;<sup>47</sup> and, if a statute prohibits servile work and labor on Sunday, there can of course be no recovery for such work.<sup>48</sup>

In some states it is provided that no person shall do any labor, work, or business on Sunday. Under such a provision all secular business is prohibited. Not only would a contract to do work on Sunday, made on some other day, be illegal because of the object, but a contract made on Sunday to work on another day would be likewise prohibited. The making of a contract is secular business, within the meaning of the statute.<sup>49</sup>

In some states only servile work and labor is prohibited. Under such a provision a contract, whether made on Sunday or on some other day, to do servile work on Sunday, would be void because of the object; but a contract made on Sunday to do such work and labor on a week day would in most states be valid. The mak-

*State v. Judge*, 39 La. Ann. 132, 1 South. Rep. 437; *State v. Fernandez*, 39 La. Ann. 538, 2 South. Rep. 233; *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. Rep. 207; *Scoles v. State*, 47 Ark. 476, 1 S. W. Rep. 769.

<sup>47</sup> *Burns v. Moore*, 76 Ala. 339.

<sup>48</sup> *Watts v. Van Ness*, 1 Hill (N. Y.) 76.

<sup>49</sup> *Northrup v. Foot*, 14 Wend. (N. Y.) 248; *Pattee v. Greely*, 13 Metc. (Mass.) 284; *Towle v. Larrabee*, 26 Me. 464; *Lyon v. Strong*, 6 Vt. 219; *Robeson v. French*, 12 Metc. (Mass.) 24; *Varney v. French*, 19 N. H. 233; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. Rep. 252; *Id.*, 25 Atl. Rep. 474; *Calhoun v. Phillips*, 87 Ga. 482, 13 S. E. Rep. 593; *Goss v. Whitney*, 27 Vt. 272; *Kepner v. Keefer*, 6 Watts (Pa.) 231; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. Rep. 26; *Smith v. Railway Co.*, 83 Wis. 271, 50 N. W. Rep. 497; *Brazee v. Bryant*, 50 Mich. 136, 15 N. W. Rep. 49; *Durant v. Rhener*, 28 Minn. 362, 4 N. W. Rep. 610. A notice to a tenant, therefore, that after the expiration of his existing term he will be charged an increased rent, if such notice is given on Sunday, and the tenant simply remains in possession after his term ends, does not raise a contract to pay such increased rent. *Cannon v. Ryan*, 49 N. J. Law, 314, 8 Atl. Rep. 293. Indorsement of note is within the statute. *First Nat. Bank v. Kingsley*, 84 Me. 111, 24 Atl. Rep. 794. Selling of soda water by a druggist is "worldly employment." *Splane v. Com.* (Pa. Sup.) 12 Atl. Rep. 431. Publication of newspaper. *Handy v. Publishing Co.*, 41 Minn. 188, 42 N. W. Rep. 872. Note 57, *infra*. Extension of time of payment of debt on Sunday is void. *Rush v. Rush* (N. J. Ch.) 18 Atl. Rep. 221.

ing of a contract, including the execution of commercial paper, is not generally regarded as servile work and labor.<sup>50</sup>

In some states the statute prohibits any person from doing any labor, business, or work "of his ordinary calling," and it is held that contracts or other business or work on Sunday by a person is not illegal unless it is within his ordinary calling.<sup>51</sup> A real-estate broker or a lawyer, therefore, would not violate the statute by purchasing or selling a horse on Sunday.

Where the statute prohibits the exposure of merchandise for sale on Sunday, it extends only to the public exposure of commodities for sale, and does not prevent private contracts of sale without such exposure.<sup>52</sup> If the statute prohibits sales, then, of course, a sale on Sunday is illegal, and the price cannot be recovered.

In Maine, and probably in some of the other states, the statute provides that the defense that a contract was executed on Sunday cannot be made to an action thereon unless the consideration is returned;<sup>53</sup> and it has been held, under such a statute, that the defense cannot be made if the consideration is of such a nature that

<sup>50</sup> *Birks v. French*, 21 Kan. 238; *Richmond v. Moore*, 107 Ill. 429; *Boynton v. Page*, 13 Wend. (N. Y.) 425. Contra, *Reynolds v. Stevenson*, 4 Ind. 619; *Link v. Clemmens*, 7 Blackf. (Ind.) 479. Sale of tickets by manager of theater, and superintending Sunday performance, is "laboring on Sunday." *Quarles v. State*, 55 Ark. 10, 17 S. W. Rep. 269. Running excursion steamboat on Sunday is "worldly employment." *Com. v. Rees*, 10 Pa. Co. Ct. R. 545. Acknowledgment on Sunday of debt barred by statute of limitations. *Thomas v. Hunter*, 29 Md. 406. Athletic games and sports on Sunday are not within the prohibition against labor, so as to prevent recovery on a lease of grounds for such games. *St. Louis Agr. & Mech. Ass'n v. Delano*, 37 Mo. App. 284; *Id.*, 108 Mo. 217, 18 S. W. Rep. 1101.

<sup>51</sup> *Hazard v. Day*, 14 Allen (Mass.) 487 (construing the Rhode Island statute); *Allen v. Gardner*, 7 R. I. 22; *Amis v. Kyle*, 2 Yerg. (Tenn.) 31; *Saunders v. Johnson*, 29 Ga. 526; *Mills v. Williams*, 16 S. C. 593; *Hellams v. Abercrombie*, 15 S. C. 110; *Swann v. Swann*, 21 Fed. Rep. 299.

<sup>52</sup> *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Batsford v. Every*, 44 Barb. (N. Y.) 618. But public exposure and sale of newspapers on Sunday is within the statute, and there can be no recovery on a contract for publishing an advertisement in a Sunday newspaper. *Smith v. Wilcox*, 24 N. Y. 353.

<sup>53</sup> *Wentworth v. Woodside*, 79 Me. 156, 8 Atl. Rep. 763; *First Nat. Bank v. Kingsley*, 84 Me. 111, 24 Atl. Rep. 794.

it cannot be returned, as in the case of a promise to pay for the use of a horse.<sup>54</sup>

*Same—Works of Necessity or Charity.*

In all of the states the statutes expressly except from the prohibition works of necessity or charity, but as to what constitutes a work of necessity or charity the authorities are somewhat conflicting.

As a rule, it may be said that whatever must be done in order to preserve life or health<sup>55</sup> or property,<sup>56</sup> and must be done on Sunday if done at all, is a work of necessity.<sup>57</sup> If property is in

<sup>54</sup> Wheelden v. Lyford, 84 Me. 114, 24 Atl. Rep. 793.

<sup>55</sup> Smith v. Watson, 14 Vt. 332; Aldrich v. Blackstone, 128 Mass. 148.

<sup>56</sup> Johnson v. People, 42 Ill. App. 594 (reaping field of grain); Whitcomb v. Gilman, 35 Vt. 297; Parmelee v. Wilks, 22 Barb. (N. Y.) 539.

<sup>57</sup> In a Massachusetts case it was said: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute; and so it was decided, in the construction of a similar exception in the prohibition against traveling on the Lord's day. \* \* \*" And the court held that it was a work of necessity to repair a defect in the highway which might endanger the limbs and lives of travelers. *Flagg v. Inhabitants*, 4 Cush. (Mass.) 243. And see *Burns v. Moore*, 76 Ala. 339. The fact that a person is traveling on Sunday, and wishes to pursue his journey, does not render the delivery of a note to him on that day a work of necessity. *Burns v. Moore*, 76 Ala. 339. The following contracts have been held to be within the exceptions: Contract securing indemnity from an absconding debtor pursued and overtaken on Sunday. *Hooper v. Edwards*, 18 Ala. 280. Repairing railroad tracks. *Yonoski v. State*, 79 Ind. 393. Bail bond. *Hammons v. State*, 59 Ala. 164. Repairing defect in highway. *Flagg v. Inhabitants*, supra. Shoeing horses used in carrying mail. *Nelson v. State*, 25 Tex. App. 599, 8 S. W. Rep. 927. Loading vessel where there is danger of navigation closing. *McGatrick v. Wason*, 4 Ohio St. 566. Pumping oil well; whether a work of necessity is a question of fact, and not of law. *Com. v. Gillespie*, 146 Pa. St. 546, 23 Atl. Rep. 393. Transportation of cattle by a railroad company is a work of necessity, so that it cannot excuse itself for delay on the ground that the delay was on Sunday. *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209. Riding for exercise is within the exception. *Sullivan v. Railroad Co.*, 82 Me. 196, 19 Atl. Rep. 169. Telegram from husband to wife explaining absence. *Burnett v. Telegraph Co.*, 39 Mo. App. 599. Telegram to physician. *W. U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27

imminent danger, work may be done on Sunday to save it. If, however, the work is only to prevent loss on a secular day, as where a mill wheel is cleaned on Sunday because to do so on another day will make it necessary to shut down and stop work for the purpose, it is not a work of necessity.<sup>58</sup>

Any act connected with religious worship,<sup>59</sup> or for the relief of suffering or distress,<sup>60</sup> is an act of charity, and may be performed on Sunday.

*Same—Incomplete Transactions.*

The fact that negotiations are carried on, and the terms of a contract agreed upon, on Sunday, where the contract is not really

N. E. Rep. 113. Telegram announcing death of father. W. U. Tel. Co. v. Wilson, 93 Ala. 32, 9 South. Rep. 414. The following have been held not within the exception: Note given on Sunday to procure discharge of a person arrested on charge of bastardy. Shipley v. Eastwood, 9 Ala. 198. Telegram respecting ordinary business affairs. W. U. Tel. Co. v. Yopst (Ind. Sup.) 11 N. E. Rep. 16. Publication and sale of newspaper. Handy v. Publishing Co., 41 Minn. 188, 42 N. W. Rep. 872; Com. v. Matthews, 12 Pa. Co. Ct. R. 149, 22 Pittsb. Leg. J. (N. S.) 309; Id., 152 Pa. St. 166, 25 Atl. Rep. 548. ~~Shaving and cutting or dressing hair by a barber is not within the exception.~~ Phillips v. Innes, 4 Clark & F. 234; State v. Schuler, 23 Wkly. Law Bul. 450. But see, contra, Ungericht v. State, 119 Ind. 379, 21 N. E. Rep. 1082; Stone v. Graves, 145 Mass. 353, 13 N. E. Rep. 906. Tobacco is not within the exception of a statute allowing sale of "drugs or medicines, provisions, or other articles of immediate necessity." State v. Ohmer, 34 Mo. App. 115.

<sup>58</sup> McGrath v. Merwin, 112 Mass. 467. And see, to the same effect, Hamilton v. Austin, 62 N. H. 575. Contra, Hennersdorf v. State, 25 Tex. App. 597, 8 S. W. Rep. 926 (in which it was held that operating an ice factory on Sunday was a work of necessity, inasmuch as to close the factory over Sunday would result in losing from 24 to 30 hours after resuming operations; that time being required to reduce the temperature after such an interruption).

<sup>59</sup> To the effect that church subscriptions made on Sunday are enforceable, see Allen v. Duffie, 43 Mich. 1, 4 N. W. Rep. 427; Bryan v. Watson, 127 Ind. 42, 26 N. E. Rep. 666; Dale v. Knepp, 98 Pa. St. 389. But see Catlett v. Trustees, 62 Ind. 365. Where a carriage is illegally hired on Sunday, the contract is not made legal "because the hirer did a kind act by conveying a young lady home who had been 'to meeting' during the day." Tillock v. Webb, 56 Me. 100. But see Buck v. City of Biddeford, infra.

<sup>60</sup> Buck v. City of Biddeford, 82 Me. 433, 19 Atl. Rep. 912.



made until a week day, does not render the contract illegal.<sup>61</sup> A promissory note, for instance, or a deed, though written and signed on Sunday, is valid if delivered on Monday, since it does not take effect until delivery;<sup>62</sup> and a sale of goods, though the negotiations are on Sunday, is valid if the goods are not set apart and delivered until Monday.<sup>63</sup>

*Same—Ratification and Rescission.*

There are many cases which hold that a contract made on Sunday, in violation of law, may be ratified on a subsequent day, and thereby become valid.<sup>64</sup> Other cases hold the contrary, on

<sup>61</sup> *Taylor v. Young*, 61 Wis. 314, 21 N. W. Rep. 408; *McKinnis v. Estes*, 81 Iowa, 749, 46 N. W. Rep. 987; *Tuckerman v. Hinkey*, 9 Allen (Mass.) 452; *Dickinson v. Richmond*, 97 Mass. 45; *Bradley v. Rea*, 103 Mass. 188; *Love v. Wells*, 25 Ind. 503; *Uhler v. Applegate*, 26 Pa. St. 140; *Beitenman's Appeal*, 55 Pa. St. 183; *Meriwether v. Smith*, 44 Ga. 541; *Bryant v. Boose*, 55 Ga. 438; *Tyler v. Waddington*, 58 Conn. 375, 20 Atl. Rep. 335; *Merrill v. Downs*, 41 N. H. 72; *Stackpole v. Symonds*, 23 N. H. 229; *Gibbs & Sterrett Manuf'g Co. v. Brucker*, 111 U. S. 597, 4 Sup. Ct. Rep. 572; *Mosely v. Vanhooser*, 6 Lea (Tenn.) 286; *Butler v. Lee*, 11 Ala. 885. The fact that a bill of sale is made on Sunday, in pursuance of a sale really made on a previous day, does not invalidate the sale. *Foster v. Wooten*, 67 Miss. 540, 7 South. Rep. 501. But see *Hanchett v. Jordan*, 43 Minn. 149, 45 N. W. Rep. 617.

<sup>62</sup> *King v. Fleming*, 72 Ill. 21; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. Rep. 331; *Hill v. Dunham*, 7 Gray (Mass.) 543; *Stacey v. Kemp*, 97 Mass. 166; *Lovejoy v. Whipple*, 18 Vt. 379; *Hilton v. Houghton*, 35 Me. 143; *Gibbs & Sterrett Manuf'g Co. v. Brucker*, 111 U. S. 597, 4 Sup. Ct. Rep. 572; *Schwab v. Rigby*, 38 Minn. 395, 38 N. W. Rep. 101; *Dohoney v. Dohoney*, 7 Bush (Ky.) 217; *Beman v. Wessels*, 53 Mich. 549, 19 N. W. Rep. 179; *Lamore v. Frisbie*, 42 Mich. 186, 3 N. W. Rep. 910; *Wilson v. Winter*, 6 Fed. Rep. 16. So, where one of two partners executes an assignment on Sunday, but the other partner executes and delivers it on a secular day, the instrument is valid. *Farwell v. Webster*, 71 Wis. 485, 37 N. W. Rep. 437.

<sup>63</sup> *Rosenblatt v. Townsley*, 73 Mo. 536; *Banks v. Werts*, 13 Ind. 203. Where, however, a contract of sale is made and the property delivered on Sunday, the transaction violates the Sunday law, though the price is paid on Monday. *Grant v. McGrath*, 56 Conn. 333, 15 Atl. Rep. 370. But see *Banks v. Werts*, *supra*.

<sup>64</sup> *Russell v. Murdock*, 79 Iowa, 101, 44 N. W. Rep. 237; *Kuhns v. Gates*, 92 Ind. 66; *Adams v. Gay*, 19 Vt. 358; *Harrison v. Colton*, 31 Iowa, 16; *Parker v. Pitts*, 73 Ind. 597; *Banks v. Werts*, 13 Ind. 203; *Melchoir v. McCarty*, 31 Wis. 256; *Gwinn v. Simes*, 61 Mo. 335; *Wilson v. Milligan*, 75 Mo.

the ground that the Sunday agreement, being void, is incapable of ratification.<sup>41</sup> On this point, therefore, there is a direct conflict.

If a contract cannot be made on Sunday, a contract made on a previous day cannot be rescinded on Sunday.<sup>42</sup>

### *Usury.*

At common law a man could contract for and recover any amount of interest for a loan of money that the borrower might be willing to give; but, to protect persons in necessity against unconscionable exactions, usury laws have been enacted in most of the states, prescribing a legal rate of interest. In some states any rate of interest is still allowed to be contracted for, if the contract is in writing, but in most states no more than the prescribed rate can be charged.

In New York and some of the other states the contract in which usury is charged is declared void. In Illinois, Wisconsin, and many other states the contract is not void, but the entire interest is forfeited. In Michigan and a number of other states only the excess of interest charged is forfeited; the legal amount is nevertheless recoverable.

Difficult questions often arise in determining what amounts to usury. The following general rules may be stated: In the first place there must be a lending and borrowing of money. If it is so understood by the parties, no shifting or contrivance for the purpose of disguising the real nature of the transaction can avail to evade the statute; and, on the other hand, if it was not a borrow-

41; *Campbell v. Young*, 9 Bush (Ky.) 245; *Williamson v. Brandenburg*, 6 Ind. App. 97, 32 N. E. Rep. 1022; *Sumner v. Jones*, 24 Vt. 317; *Flinn v. St. John*, 51 Vt. 334; *Sayles v. Wellman*, 10 R. I. 486; *Hopkins v. Stefan*, 77 Wis. 45, 45 N. W. Rep. 676; *Haacke v. Knights of Liberty Social & Literary Club*, 76 Md. 429, 25 Atl. Rep. 422; *Van Hoven v. Irish*, 10 Fed. Rep. 13. Account stated on a week day for indebtedness arising out of a sale on Sunday. *Melchoir v. McCarty*, 31 Wis. 252.

<sup>42</sup> *Day v. McAllister*, 15 Gray (Mass.) 433; *Allen v. Deming*, 14 N. H. 133; *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. Rep. 906; *Tillock v. Webb*, 56 Me. 100; *Plaisted v. Palmer*, 63 Me. 576; *Kountz v. Price*, 40 Miss. 341; *Grant v. McGrath*, 56 Conn. 333, 15 Atl. Rep. 370. But see *Winchell v. Carey*, 115 Mass. 560.

<sup>43</sup> *Benedict v. Bachelder*, 24 Mich. 425.

ing and lending, it cannot be brought within the statute.<sup>67</sup> The parties to a contract, for instance, may agree on a sum as stipulated damages in case of breach, and it may be recovered, though it exceeds the legal interest on the value of property which should have been paid.<sup>68</sup> So, also, on a loan of chattels, the agreed compensation may be recovered, though it exceeds what would be the legal rate of interest on the value of the chattel;<sup>69</sup> and, after a negotiable instrument has been executed and delivered, it is not usury for a person to buy it from the holder at a discount greater than the legal rate of interest, except, according to some opinions, in the case of accommodation paper.<sup>70</sup> In neither of these cases

<sup>67</sup> *Tyson v. Rickard*, 3 Har. & J. (Md.) 109; *Price v. Campbell*, 2 Call (Va.) 110; *Ferguson v. Sutphen*, 3 Gilman (Ill.) 547; *Osborn v. McCowen*, 25 Ill. 218; *Struthers v. Drexel*, 122 U. S. 487, 7 Sup. Ct. Rep. 1293; *Hathaway v. Hagan*, 59 Vt. 75, 8 Atl. Rep. 678; *Galther v. Clark*, 67 Md. 18, 8 Atl. Rep. 740; *Hartranft v. Uhlinger*, 115 Pa. St. 270, 8 Atl. Rep. 244; *Lukens v. Hazlett*, 37 Minn. 441, 35 N. W. Rep. 265; *Pope v. Marshall*, 78 Ga. 635, 4 S. E. Rep. 116; *Drury v. Wolfe*, 34 Ill. App. 23; *Id.*, 134 Ill. 294, 25 N. E. Rep. 626. Money paid above the legal rate for the forbearance of an existing debt is usury. *Hathaway v. Hagan*, *supra*. Charging "banker's commission." *Bowdoin v. Hammond* (Md.) 28 Atl. Rep. 769. An agreement by which a party lends United States bonds and the borrower agrees to pay over to the owner the interest paid by the government, and 6 per cent. in addition, is not a contract for the loan of money. *Marshall v. Rice*, 85 Tenn. 502, 3 S. W. Rep. 177. Loans by building and loan association. *Jackson v. Cassidy*, 68 Tex. 282, 4 S. W. Rep. 541; *Tilley v. American Bldg. & Loan Ass'n*, 52 Fed. Rep. 618; *Succession of Latchford*, 42 La. Ann. 529, 7 South. Rep. 628; *Hensel v. Association*, 85 Tex. 215, 20 S. W. Rep. 116; *International Bldg. & Loan Ass'n v. Abbott*, 85 Tex. 220, 20 S. W. Rep. 118; *Sullivan v. Association*, 70 Miss. 94, 12 South. Rep. 590; *Reeve v. Association*, 56 Ark. 335, 19 S. W. Rep. 917. Four things, it is said, are necessary to constitute usury: (1) A loan, express or implied; (2) an understanding between the parties that the money shall be or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid; and (4) a corrupt intent to take more than the legal rate for the use of the sum loaned. *Balfour v. Davis*, 14 Or. 47, 12 Pac. Rep. 89.

<sup>68</sup> *Tardeveau v. Smith*, Hard. (Ky.) 175; *Blackburn v. Hayes* (Ark.) 27 S. W. Rep. 240.

<sup>69</sup> *Hall v. Haggart*, 17 Wend. (N. Y.) 280; *Bull v. Rice*, 5 N. Y. 315.

<sup>70</sup> *Lloyd v. Keech*, 2 Conn. 175; *Nichols v. Fearson*, 7 Pet. 103; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44; *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Jackson v. Travis*, 42 Minn. 438, 44 N. W. Rep. 316; *Holmes v. Bank*,

is there a loan or forbearance of money.<sup>71</sup> As already said, however, the contract must be made bona fide, and not as a cover for a loan.<sup>72</sup>

It has also been held that if a person agrees to pay a specific sum, exceeding the lawful interest, provided he does not pay the principal by a day certain, it is not usury, since by a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty;<sup>73</sup> and, further, that where a loan

33 Minn. 350, 53 N. W. Rep. 555; *Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. Rep. 360; *Chase Nat. Bank v. Faurot* (Sup.) 25 N. Y. Supp. 447; *Rodecker v. Littauer*, 59 Fed. Rep. 857. There is some conflict of opinion on this question. The question is fully discussed, and the authorities collected, in *Dickerman v. Day*, 31 Iowa, 444, 7 Am. Rep. 156.

<sup>71</sup> See, also, *Truby v. Mosgrove*, 118 Pa. St. 89, 11 Atl. Rep. 806; Appeal of *Trine* (Pa. Sup.) 13 Atl. Rep. 765. If a person sells chattels or land on credit, the fact that he charged a larger sum than he would have charged if he had sold for cash does not render the transaction usurious. *Bull v. Rice*, 5 N. Y. 315; *Brooks v. Avery*, 4 N. Y. 225; *Gilmore v. Ferguson*, 28 Iowa, 220; *Swayne v. Riddle*, 37 W. Va. 291, 16 S. E. Rep. 512; *Brown v. Gardner*, 4 Lea (Tenn.) 145; *Graeme v. Adams*, 23 Grat. (Va.) 225; *Wheeler v. Marchbanks*, 32 S. C. 594, 10 S. E. Rep. 1011; *Bass v. Patterson*, 68 Miss. 310, 8 South. Rep. 849. Contra, *Fisher v. Hoover*, 3 Tex. Civ. App. 81, 21 S. W. Rep. 930. Where, for instance, upon a purchase of land the vendee agrees to pay, as part of the purchase price, a rate of interest on the deferred payments in excess of the legal rate, the contract is not usurious. *Askin v. Lebus* (Ky.) 4 S. W. Rep. 305; *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. Rep. 375; *Dykes v. Bottoms* (Ala.) 13 South. Rep. 582. For other cases in which it has been held that the relation of borrower and lender did not exist, see Appeal of *Donehoo* (Pa. Sup.) 15 Atl. Rep. 924; *Niebuhr v. Schreyer* (Com. Pl.) 13 N. Y. Supp. 809; *McComb v. Association*, 134 N. Y. 598, 31 N. E. Rep. 613; *Duval v. Neal*, 70 Miss. 288, 12 South. Rep. 145; *Eddy v. Northup* (Ky.) 23 S. W. Rep. 353. Sale or loan. *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S. W. Rep. 126. Sale below par of city bonds bearing highest rate of interest not usurious. *City of Memphis v. Bethel* (Tenn.) 17 S. W. Rep. 191.

<sup>72</sup> *Lloyd v. Scott*, 4 Pet. 205. Discount of paper as a cover for a loan. *Churchill v. Suter*, 4 Mass. 156; *Jones v. Hake*, 2 Johns. Cas. (N. Y.) 60; *Wilkie v. Roosevelt*, 3 Johns. Cas. (N. Y.) 66; *Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. Rep. 360.

<sup>73</sup> *Lloyd v. Scott*, 4 Pet. 205; *Gambriel v. Doe*, 8 Blackf. (Ind.) 140; *Fisher v. Anderson*, 25 Iowa, 28; *Righter v. Warehouse Co.*, 99 Pa. St. 289; *M'Nairy v. Bell*, 1 Yerg. (Tenn.) 502; *Downey v. Beach*, 78 Ill. 53; *Davis v. Rider*, 53 Ill. 416; *Walker v. Abt*, 83 Ill. 226; *Ramsay v. Morrison*, 39 N. J. Law, 591; *Upton v. O'Donahue*, 32 Neb. 565, 49 N. W. Rep. 267; *Conrad v. Gibbon*,

is made, to be returned at a fixed day, with more than the legal rate of interest, depending on a casualty which hazards both principal and interest, the contract is not usurious; but where the interest, only, is hazarded, it is usury.<sup>74</sup>

As to whether it is usury to charge compound interest,—that is, interest upon overdue interest,—the decisions are conflicting, but according to the weight of authority it is not so regarded; but interest cannot be charged on interest not due.<sup>75</sup> It is not usury to provide for payment of an attorney's fee if the debt has to be collected by suit;<sup>76</sup> nor to require payment in advance of the

29 Iowa, 120; Hackenberry v. Shaw, 11 Ind. 392; Rogers v. Sample, 33 Miss. 310. But see Carroll Co. Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. Rep. 313; Seekel v. Norman, 78 Iowa, 254, 43 N. W. Rep. 190.

<sup>74</sup> Lloyd v. Scott, 4 Pet. 205; Truby v. Mosgrove, 118 Pa. St. 89, 11 Atl. Rep. 806; Thorndike v. Stone, 11 Pick. (Mass.) 183; Wilson v. Kilburn, 1 J. J. Marsh. (Ky.) 494; Spencer v. Tilden, 5 Cow. (N. Y.) 144.

<sup>75</sup> Stewart v. Petree, 55 N. Y. 621; Young v. Hill, 67 N. Y. 162; Culver v. Bigelow, 43 Vt. 249; Quimby v. Cook, 10 Allen (Mass.) 32; Wilcox v. Howland, 23 Pick. (Mass.) 167; Merck v. Mortgage Co. (Ga.) 7 S. E. Rep. 265; Austin v. Bacon, 28 Wis. 416; Taylor v. Hiestand, 46 Ohio St. 345, 20 N. E. Rep. 345; Fobes v. Cantfield, 3 Ohio, 17; Gilmore v. Bissell, 124 Ill. 438, 16 N. E. Rep. 925; Brown v. Vandyke, 8 N. J. Eq. 795; Keiser v. Decker, 29 Neb. 92, 45 N. W. Rep. 272; Telford v. Garrels, 132 Ill. 550, 24 N. E. Rep. 573; Hale v. Hale, 1 Cold. (Tenn.) 232; Woods v. Rankin, 2 Heisk. (Tenn.) 46; Ginn v. Security Co., 92 Ala. 135, 8 South. Rep. 388; Brown v. Bank (Iowa) 53 N. W. Rep. 410. See, for distinctions, Cox v. Brookshire, 76 N. C. 314; Simpson v. Evans, 44 Minn. 419, 46 N. W. Rep. 908; Kimbrough v. Lukins, 70 Ind. 373; Drury v. Wolfe, 134 Ill. 294, 25 N. E. Rep. 626; Leonard v. Patton, 106 Ill. 99; Mathews v. Toogood (Neb.) 37 N. W. Rep. 265; Hochmark v. Richler (Colo. Sup.) 26 Pac. Rep. 818; Young v. Hill, *supra*. In some jurisdictions, however, the courts have refused to allow recovery of interest on interest, on the ground that it savored of usury, and was contrary to the policy of the law. See Bowman v. Neeley (Ill. Sup.) 37 N. E. Rep. 840; Wilcox v. Howland, *supra*; Henry v. Flagg, 13 Metc. (Mass.) 64; Cox v. Smith, 1 Nev. 133.

<sup>76</sup> Weatherby v. Smith, 30 Iowa, 131; Dorsey v. Wolff (Ill.) 32 N. E. Rep. 495; Williams v. Flowers, 90 Ala. 136, 7 South. Rep. 439; Merck v. Mortgage Co. (Ga.) 7 S. E. Rep. 265; Smith v. Silvers, 32 Ind. 321; First Nat. Bank v. Canatsey, 34 Ind. 149; National Bank v. Danforth, 80 Ga. 55, 7 S. E. Rep. 546; Farmers' Bank v. Barton, 21 Ill. App. 403; Barton v. Farmers' Bank, 122 Ill. 352, 13 N. E. Rep. 503; Ricker v. Scofield, 28 Ill. App. 32; Haldeman v. Insurance Co., 120 Ill. 390, 11 N. E. Rep. 526; Shelton v. Aultman, 82 Ala.

highest legal rate;" nor, under some circumstances, to pay a broker a commission, or for expenses, for procuring the loan,"

315, 8 South. Rep. 232; *Fowler v. Trust Co.*, 141 U. S. 411, 12 Sup. Ct. Rep. 8. It is otherwise by express statutory provisions in some states.

¶ *Parker v. Cousins*, 2 Grat. (Va.) 372; *Telford v. Garrels*, 132 Ill. 550, 24 N. E. Rep. 573; *Meyer v. Muscatine*, 1 Wall. 384; *Vahlberg v. Keaton*, 51 Ark. 534, 11 S. W. Rep. 878; *Goodrich v. Reynolds*, 31 Ill. 490; *McGill v. Ware*, 4 Scam. (Ill.) 21; *Fowler v. Trust Co.*, 141 U. S. 384, 12 Sup. Ct. Rep. 1; *English v. Smock*, 34 Ind. 115; *Newell v. Bank*, 12 Bush (Ky.) 57; *Rose v. Munford* (Neb.) 54 N. W. Rep. 129; *Maxwell v. Willett*, 49 Ill. App. 564; *Hawks v. Weaver*, 46 Barb. (N. Y.) 164; *Mackenzie v. Flannery* (Ga.) 16 S. E. Rep. 710.

¶ *Suydam v. Westfall*, 4 Hill (N. Y.) 211; *Matthews v. Coe*, 70 N. Y. 239; *Merck v. Mortgage Co. (Ga.)* 7 S. E. Rep. 265; *Boardman v. Taylor*, 66 Ga. 638; *Haldeman v. Insurance Co.*, 120 Ill. 390, 11 N. E. Rep. 526; *New England Mortg. Sec. Co. v. Gay*, 33 Fed. Rep. 636; *Thomas v. Miller*, 39 Minn. 339, 40 N. W. Rep. 358; *Baird v. Millwood*, 51 Ark. 548, 11 S. W. Rep. 881; *Cockle v. Flack*, 93 U. S. 344; *Pass v. Security Co.*, 66 Miss. 365, 6 South. Rep. 239; *Hughes v. Griswold*, 82 Ga. 299, 9 S. E. Rep. 1092; *Hall v. Daggett*, 6 Cow. (N. Y.) 653; *Nourse v. Prime*, 7 Johns. Ch. (N. Y.) 69; *Morton v. Thurber*, 85 N. Y. 550; *Telford v. Garrels*, 132 Ill. 550, 24 N. E. Rep. 573; *Ginn v. Security Co.*, 92 Ala. 135, 8 South. Rep. 388; *White v. Dwyer*, 31 N. J. Eq. 40; *Davis v. Sloman*, 27 Neb. 877, 44 N. W. Rep. 41; *Ammondson v. Ryan*, 111 Ill. 506; *Weems v. Jones*, 86 Ga. 700, 13 S. E. Rep. 89. Even the lender himself, it has been held, may charge for extra services and expenses rendered or incurred by him in good faith, for, to constitute usury, the charge must be for the loan or forbearance. *Atlanta Min. Co. v. Gwyer*, 48 Ga. 9; *Morton v. Thurber*, 85 N. Y. 550; *Ammondson v. Ryan*, 111 Ill. 506; *De Forest v. Strong*, 8 Conn. 513; *Dayton v. Moore*, 30 N. J. Eq. 543; *Daley v. Investment Co.*, 43 Minn. 517, 45 N. W. Rep. 1100; *Swanstrom v. Balstad* (Minn.) 53 N. W. Rep. 648; *Thurston v. Cornell*, 38 N. Y. 281; *Trotter v. Curtis*, 19 Johns. (N. Y.) 160; *Matthews v. Coe*, 70 N. Y. 239. But see *Jackson v. May*, 28 Ill. App. 305. But if the lender exacts a bonus in addition to the interest at the legal rate, it is usury. *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122; *Hewitt v. Dement*, 57 Ill. 500; *Walter v. Foutz*, 52 Md. 147; *Andrews v. Poe*, 30 Md. 485; *Harris v. Wicks*, 28 Wis. 198; *Stark v. Sperry*, 6 Lea (Tenn.) 411; *Rowland v. Bull*, 5 B. Mon. (Ky.) 146. But the exacting of a bonus or commission by an agent as a condition of making a loan at legal interest for his principal, without the knowledge or consent of the latter, does not constitute usury in the principal. *Condit v. Baldwin*, 21 N. Y. 219; *Esteves v. Purdy*, 66 N. Y. 446; *Bell v. Day*, 32 N. Y. 165; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. Rep. 379; *Van Wyck v. Watters*, 81 N. Y. 352; *New England Mortg. Sec. Co. v. Townes* (Miss.) 1 South. Rep. 242; *Acheson v. Chase*, 28 Minn. 211, 9 N. W. Rep. 734; *Brigham v. Myers*, 51 Iowa, 397, 1 N.

provided, as in other cases, it is not a cover for a usurious transaction.<sup>79</sup> It has been held that it is usury to delay payment of the money loaned, and exact interest for the full time.<sup>80</sup>

If a contract reserves excessive interest merely because of a mistaken calculation, it is not for that reason usurious. There must be an intention to charge and to pay the illegal rate.<sup>81</sup>

W. Rep. 613; *Gokey v. Knapp*, 44 Iowa, 32; *Ballinger v. Bourland*, 87 Ill. 513; *Boylston v. Bain*, 90 Ill. 283; *Conover v. Van Meter*, 18 N. J. Eq. 481; *Manning v. Young*, 28 N. J. Eq. 568; *Williams v. Bryan*, 68 Tex. 593, 5 S. W. Rep. 401; *Lane v. Washington Ins. Co.*, 46 N. J. Eq. 316, 19 Atl. Rep. 617; *May v. Flint*, 54 Ark. 573, 16 S. W. Rep. 575; *Boardman v. Taylor*, 66 Ga. 638; *Ammerman v. Ross* (Iowa) 51 N. W. Rep. 6; *Dreyfus v. Burnes*, 53 Fed. Rep. 410. Not even where the agent is the general agent of the lender to loan money, if the illegal exaction from the borrower is solely for the agent's benefit, and without the knowledge or sanction of the lender, and he in no way ratifies it. *Stein v. Swenson*, 44 Minn. 218, 46 N. W. Rep. 360. But see *Kemmitt v. Adamson*, 44 Minn. 121, 46 N. W. Rep. 327. If the principal knows of the exaction by his own agent, the contract is usurious. *Banks v. Flint*, 54 Ark. 40, 14 S. W. Rep. 769, 16 S. W. Rep. 477; *Bliven v. Lydecker*, 130 N. Y. 102, 28 N. E. Rep. 625; *Payne v. Newcomb*, 100 Ill. 611. Payment to attorney for examining title. *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. Rep. 47. A bonus paid by a borrower to his own agent for procuring a loan is no part of the sum paid for the loan, and is not to be considered on an issue of usury. *Dryfus v. Burnes*, 53 Fed. Rep. 410; *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. Rep. 47; *Grieser v. Hall* (Minn.) 57 N. W. Rep. 462. But see, contra, where the lender knew of the payment. *Brown v. Brown* (S. C.) 17 S. E. Rep. 452 (McIver, C. J., dissenting). And see *Holt v. Kirby* (Ark.) 21 S. W. Rep. 432.

<sup>79</sup> *Sherwood v. Roundtree*, 32 Fed. Rep. 113; *Pfenning v. Scholer*, 43 N. J. Eq. 15, 10 Atl. Rep. 833; *Sanford v. Kane*, 133 Ill. 199, 24 N. E. Rep. 414.

<sup>80</sup> *Barr's Adm'x v. African M. E. Church* (N. J. Ch.) 10 Atl. Rep. 287. But where the negotiation for a loan is transacted through the mails, and a reasonable time transpires between the date of the execution of the securities, which bear interest from their date, and their final acceptance, and delivery to the mortgagor of the money loaned, and there is no intention to exact an unlawful rate of interest, there is no usury because of such lapse of time. *Daley v. Investment Co.*, 43 Minn. 517, 45 N. W. Rep. 1100. Nor does the delay render the contract usurious where it is due to the failure of the borrower to have the title to the land on which the loan is to be secured made clear of incumbrances as agreed. *Rose v. Munford* (Neb.) 54 N. W. Rep. 129.

<sup>81</sup> *Tyson v. Rickard*, 3 Har. & J. (Md.) 109; *Bevier v. Covell*, 87 N. Y. 50; *Gibson v. Stearns*, 3 N. H. 185; *Smythe v. Allen*, 67 Miss. 146, 6 South. Rep. 627; *Bearce v. Barstow*, 9 Mass. 45; *Brown v. Bank* (Iowa) 53 N. W. Rep.

A note given for a balance due on previous notes which were usurious, or in renewal of usurious notes, is itself tainted with usury,<sup>82</sup> but a note given to a third party for money to be applied in payment of other notes which were usurious is not itself usurious.<sup>83</sup>

*Wagers and Gambling Transactions.*

A "wager" has been defined as a contract conditional upon an event in which the parties have no interest except that which they create by the wager;<sup>84</sup> but this attempts to limit the term to contracts not permitted by law, and is not broad enough. Parties

410; Lloyd v. Scott, 4 Pet. 205; Price v. Campbell, 2 Call (Va.) 110; McFarland v. State Bank, 4 Ark. 44; Henry v. Sansom, 2 Tex. Civ. App. 150, 21 S. W. Rep. 69; McElfatrick v. Hicks, 21 Pa. St. 402.

<sup>82</sup> Cottrell v. Southwick, 71 Iowa, 50, 32 N. W. Rep. 22; Exley v. Berryhill, 37 Minn. 182, 33 N. W. Rep. 567; Parsons v. Babcock (Neb.) 58 N. W. Rep. 726; McDonald v. Aufdengarten (Neb.) 59 N. W. Rep. 762; Exeter Bank v. Orchard (Neb.) 58 N. W. Rep. 144; Levey v. Allien (Sup.) 25 N. Y. Supp. 352. If, however, a usurious contract is mutually abandoned by the parties, and the securities canceled or destroyed, so that they may not become the foundation of an action, and the borrower then makes a contract to pay the amount actually received by him, this last contract will not be tainted with the original usury. Sheldon v. Haxtun, 91 N. Y. 125; Levey v. Allien, supra; Porter v. Jefferies (S. C.) 18 S. E. Rep. 229.

<sup>83</sup> Cottrell v. Southwick, 71 Iowa, 50, 32 N. W. Rep. 22; Vaught v. Rider, 83 Va. 659, 3 S. E. Rep. 293; Trimble v. Thorson, 80 Iowa, 246, 45 N. W. Rep. 742; Brown v. Bank (Iowa) 53 N. W. Rep. 410; France v. Smith (Iowa) 54 N. W. Rep. 366. Contra, where the transaction is a mere cover for a usurious loan. Luckens v. Hazlett, 37 Minn. 441, 35 N. W. Rep. 235.

<sup>84</sup> Leake, Cont. 377. In a South Carolina case the action was brought on a note given in part payment of land which the defendant had purchased of the plaintiff. By the terms of the note the defendant promised to pay about \$900 if cotton should rise to 8 cents by a certain date, and, if not, to pay \$500 for value received. It was objected that the agreement was a wager on the price of cotton, but the court held that the objection was "plainly inapplicable, for the parties had an interest in the contingency. The defendant purchased the land at the lowest price, unconditionally, but contracted to pay a larger sum if the value should be enhanced by the increased value of its product." Ferguson v. Coleman, 3 Rich. Law (S. C.) 99. A contract by which a party purchases 50 bushels of "Bohemian oats" at \$10 a bushel, and the seller agrees to sell for him the next year 100 bushels at \$10 a bushel, has been held not to be a gambling contract. Shipley v. Reasoner, 80 Iowa, 548, 45 N. W. Rep. 1077. And see Hanks v. Brown, 79 Iowa, 560, 44 N. W. Rep.



may make a wager on a matter in which they are interested. It is more accurate to say that a wager is a promise to pay money or transfer property upon the determination or ascertainment of an uncertain event or fact, the consideration for the promise being either a present payment or transfer by the other party, or a promise to do so upon the event or fact being determined or ascertained in a particular way.<sup>85</sup> The term is often applied to contracts not permitted by law, as opposed to others which, though precisely similar in their nature, may be enforced, and this has resulted in some confusion.

A wager may be what we understand by a "bet,"—that is, a purely gambling transaction,—or it may be directed to commercial objects. A man who bets on the result of a horse race makes a wagering contract; but so does a man who takes out a policy of insurance, for he bets on the safety of the property insured, or on the duration of the life, as the case may be. In the latter case the contract may be valid, but it is nevertheless a wager.<sup>86</sup>

At common law in England, over a century ago, wagers on almost all subjects were enforceable. Gradually the courts, finding that frivolous and indecent matters were sometimes brought before them for decision, established a rule that a wager would not be enforced if it led to indecent evidence, or was calculated to injure or pain a third person, and in some cases general notions of public policy were introduced to the effect that any wager which tempted a man to offend against the law was illegal.<sup>87</sup> In a leading case, for instance, a bet on the life of Napoleon Bonaparte was held to be unenforceable as tending, on the one side, to weaken the patriotism of an Englishman, and, on the other, to encourage the assassina-

811; *Matson v. Blosson* (Sup.) 2 N. Y. Supp. 551; *Merrill v. Packer*, 80 Iowa, 542, 45 N. W. Rep. 1076. Contra, *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. Rep. 281.

<sup>85</sup> *Anson*, Cont. 173; *Hampden v. Walsh*, 1 Q. B. Div. 189.

<sup>86</sup> *Anson*, Cont. 174-176.

<sup>87</sup> See *Gilbert v. Sykes*, 16 East, 150; *Hartley v. Rice*, 10 East, 22; *Good v. Elliott*, 3 Term R. 693; *Eltham v. Kingsman*, 1 Barn. & Ald. 683; *Atherford v. Beard*, 2 Term R. 610; *Evans v. Jones*, 5 Mees. & W. 77; *Ditchburn v. Goldsmith*, 4 Camp. 152. And see *Brogden v. Marriott*, 3 Bing. N. C. 88; *Bunn v. Riker*, 4 Johns. (N. Y.) 426; *Rust v. Gott*, 9 Cow. (N. Y.) 169; *Hill v. Kidd*, 48 Cal. 615; *Visher v. Yates*, 11 Johns. (N. Y.) 21.

tion of a foreign ruler, and thereby provoke retaliation upon the person of the English sovereign.<sup>88</sup> The reasons given for this decision are rather ludicrous, and could not really have influenced the court. The real motive which prompted this and other decisions was the inconvenience of countenancing idle wagers in a court of justice.<sup>89</sup>

Aside from these cases, wagers continued to be enforced in England, and have been enforced in many of our states.<sup>90</sup> In other

<sup>88</sup> *Gilbert v. Sykes*, 16 East, 150.

<sup>89</sup> *Bayley, J.*, in *Gilbert v. Sykes*, *supra*; *Anson*, Cont. 176; *Savage v. Madder*, 36 L. J. Exch. 178. Another case, which shows the far-fetched reasons to which the courts resorted in order to defeat wagers, was one in which it was held that a wager on the amount of hop duty was against public policy, because the evidence at the trial would expose to the world the amount of public revenue. *Atherford v. Beard*, 2 Term R. 610. So, also, where one proprietor of carriages for hire in a town made a bet with another that a particular person would go to the assembly rooms in his carriage, and not in the other's, it was thought that the bet was void, as tending to abridge the freedom of one of the public in choosing his own conveyance, and to expose him to the inconvenience of being importuned by rival coachmen. *Eltham v. Kingsman*, 1 Barn. & Ald. 683. "I regret to say," it was once said by Lord Campbell, "that we are bound to consider the common law of England to be that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern, and almost shame, on the subterfuges and contrivances and evasions to which judges in England long resorted in struggling against this rule." *Ramloll v. Soojumnul*, 6 Moore, P. C. 310.

<sup>90</sup> *Campbell v. Richardson*, 10 Johns. (N. Y.) 406; *Good v. Elliott*, 3 Term R. 693; *Clendining v. Church*, 3 Caines (N. Y.) 141; *Winchester v. Nutter*, 52 N. H. 507; *Deweese v. Miller*, 5 Har. (Del.) 347; *Stoddard v. Martin*, 1 R. I. 1; *Buchanan v. Insurance Co.*, 6 Cow. (N. Y.) 318; *Wheeler v. Spencer*, 15 Conn. 28; *Johnson v. Russell*, 37 Cal. 670; *Wroth v. Johnson*, 4 Har. & McH. (Md.) 284; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. Rep. 646; *Trenton Ins. Co. v. Johnson*, 24 N. J. Law, 576; *Haskett v. Wootan*, 1 Nott & McC. (S. C.) 180; *Kirkland v. Randon*, 8 Tex. 10. Wager as to the shape of the earth, *Hampden v. Walsh*, 1 Q. B. Div. 189; as to the weight of a hog, *Mulford v. Bowen*, 9 N. J. Law, 315; as to the result of a past election in another state, *Smith v. Smith*, 21 Ill. 244; as to the time within which a railroad would be completed, *Beadles v. Bless*, 27 Ill. 320; *Johnson v. Fall*, 6 Cal. 350.

states, more particularly the New England states, which were settled by the Puritans, the courts have held all wagering contracts on matters in which the parties have no interest illegal, as being contrary to public policy.<sup>91</sup>

There are now, both in England and in this country, statutes covering the subject. We can only notice them very generally.

*Same—Statutes as to Wagers.*

By the English statute 16 Car. II. c. 7, it was provided that any sum or value exceeding £100 lost in playing at any game, or in betting on the players, should not be recoverable, and that any contract or security given for the same should be void. The statute 9 Anne, c. 14, provided that securities for money lost in playing at games, or betting on the players, or knowingly advanced for such purposes, should be void; and, further, that the loser of £10 or more, after paying it, might recover it back. The statute 5 & 6 Wm. IV. c. 41, repealed the act of Anne so far as regarded the avoidance of securities as specified in that act, and provided that they should thenceforth be taken to have been originally given upon an illegal consideration. The last English statute on the subject (8 & 9 Vict. c. 109) provided that "all contracts, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided, always,

<sup>91</sup> Harvey v. Merrill, 150 Mass. 1, 22 N. E. Rep. 49; Irwin v. Willmar, 110 U. S. 499, 4 Sup. Ct. Rep. 160; Amory v. Gilman, 2 Mass. 1; Love v. Harvey, 114 Mass. 80; Perkins v. Eaton, 3 N. H. 152; West v. Holmes, 26 Vt. 530; Winchester v. Nutter, 52 N. H. 507; Wheeler v. Spencer, 15 Conn. 28; Lewis v. Littlefield, 15 Me. 233; Stoddard v. Martin, 1 R. I. 1; Collamer v. Day, 2 Vt. 144; Edgell v. McLaughlin, 6 Whart. (Pa.) 176; Thomas v. Cronise, 16 Ohio, 54; Lucas v. Harper, 24 Ohio St. 328; Bernard v. Taylor, 23 Or. 416, 31 Pac. Rep. 968; Rice v. Gist, 1 Stro. (S. C.) 82; Wilkinson v. Towseley, 16 Minn. 299 (Gil. 263); Eldred v. Malloy, 2 Colo. 320. "It would seem a disgraceful occupation of the courts of any country to sit in judgment between two gamblers, in order to decide which was the best calculator of chances, or which had the most cunning of the two. There could be but one step of degradation below this, which is that the judges should be the stakeholders of the parties." Per Parker, J., in Amory v. Gilman, *supra*.

that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plates, prizes, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." This act repeals the statutes of Charles and Anne, but does not affect the provisions of the statute of William as to securities.

The legislation in England is thus shown at length, because it has been substantially followed, in part or in whole, in many of our states. In some of the states the statutes of Charles and Anne are regarded as a part of the common law, supplemented by statutes enacted by the state legislature.<sup>22</sup> There is so much difference in the statutes of the different states that it would be impracticable to attempt to give them. The statutes of the particular state should be consulted. It is sufficient to say that in almost all the states, if not in all, the statutes make all gambling contracts either void, or both illegal and void.

*Same—Offer of Premium or Reward.*

Neither under the common law nor under the statutes against gaming, betting, and wagers is the bona fide offer of premiums or purses on horse races or other legitimate competitions illegal, and it is immaterial that the competitors are required to pay an entrance fee before they are allowed to compete, and that these fees go to make up in part the premium or purse offered.<sup>23</sup>

*Same—Contracts of Insurance.*

At common law, in England, contracts of insurance, like other wagers, were valid though the assured had no interest whatever

<sup>22</sup> See Clark, Cr. Law, 17; Emerson v. Townsend, 73 Md. 224, 20 Atl. Rep. 984.

<sup>23</sup> Porter v. Day, 71 Wis. 296, 37 N. W. Rep. 259. And see Harris v. White, 81 N. Y. 532; Misner v. Knapp, 13 Or. 135, 9 Pac. Rep. 65; Deller v. Society, 57 Iowa, 481, 10 N. W. Rep. 872; Alvord v. Smith, 63 Ind. 58. In some states the offer of such rewards or premiums is prohibited in certain cases. Bronson Agricultural & B. Ass'n v. Ramsdell, 24 Mich. 441. It is otherwise where the offer of a premium is a mere subterfuge to cover a bet; as where the owners of horses make up a purse, and put it in the hands of a third person to pay to the one of them whose horse shall win. Gibbons v. Gouverneur, 1 Denio (N. Y.) 170.

in the property or the life insured;<sup>84</sup> and the English doctrine, as we have seen, has been recognized in a few of our states.<sup>85</sup> Probably in most of our states, however, the doctrine has been repudiated, and it has been held, independently of any statute, that contracts of insurance with a person who has no interest in the property or life are mere gambling transactions, and are void.<sup>86</sup> The subject is now very generally dealt with by statute both in England and with us, so that there is seldom any occasion to look to the common law. By these statutes, any contract of marine, fire, or life insurance is declared void unless the assured has an insurable interest.

The question as to what amounts to an insurable interest is one more peculiarly for a work on insurance, and it would be impracticable for us to go into it. In the case of marine or fire insurance it is sufficient to say that if a person has any interest in the vessel, cargo, or other property, legal or equitable, so that he would suffer a loss if it should be destroyed, he has an insurable interest.<sup>87</sup> In the case of life insurance it has been said that "all which it seems necessary to show in order to take the policy out of the objection of being a wager policy is that the insured has some interest in the life of the cestui que vie; that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages supposed to depend on the life of another."<sup>88</sup>

#### *Same—Futures.*

An agreement for the sale of stocks, grain, or any other commodity is a gambling contract where the parties do not intend an actual delivery, but agree that at the time fixed for delivery they

<sup>84</sup> *Kulen Kemp v. Vigne*, 1 Term R. 304; *Dean v. Dicker*, 2 Strange, 1250.

<sup>85</sup> *Glendinning v. Church*, 3 Calnes (N. Y.) 141; *Buchanan v. Insurance Co.*, 6 Cow. (N. Y.) 318; *Trenton Ins. Co. v. Johnson*, 24 N. J. Law, 576.

<sup>86</sup> *Stevens v. Warren*, 101 Mass. 584; *Warnock v. Davis*, 104 U. S. 775; *Amory v. Gilman*, 2 Mass. 1; *Loomis v. Insurance Co.*, 6 Gray (Mass.) 396; *Besch v. Insurance Co.*, 28 Ind. 64; *Bevin v. Insurance Co.*, 23 Conn. 244; *Sawyer v. Mayhew*, 51 Me. 398; *Sweeney v. Insurance Co.*, 20 Pa. St. 337; *Fowler v. Insurance Co.*, 26 N. Y. 422; ante, p. 408.

<sup>87</sup> 1 Bld. Ins. § 155 et seq.

<sup>88</sup> *Loomis v. Insurance Co.*, 6 Gray (Mass.) 398; 1 Bld. Ins. § 186 et seq.

shall settle by one of them paying the other the difference between the price agreed upon and the market price at the time of delivery. This is a mere bet or speculation on the rise and fall of the price of the article, and is illegal, not only under the statutes, but in most states even independently of any statute.<sup>99</sup> The law on this subject was thus stated in a late Massachusetts case: "If, in a formal contract for the purchase and sale of merchandise to be delivered

<sup>99</sup> *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. Rep. 49; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160; *Gregory v. Wendell*, 39 Mich. 337; *Rumsey v. Berry*, 65 Me. 570; *Cockrell v. Thompson*, 85 Mo. 510; *Stewart v. Schall*, 65 Md. 289; *Burt v. Meyer*, 71 Md. 467, 18 Atl. Rep. 796; *Lyon v. Culbertson*, 83 Ill. 33; *Brua's Appeal*, 55 Pa. St. 294; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Maxton v. Gheen*, 75 Pa. St. 166; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Whitesides v. Hunt*, 97 Ind. 191; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. Rep. 713; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. Rep. 203; *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. Rep. 269; *Lowry v. Dillman*, 59 Wis. 197, 13 N. W. Rep. 4; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. Rep. 252, and 9 N. W. Rep. 595; *Johnson v. Kaune*, 21 Mo. App. 22; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. Rep. 646; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Bartlett v. Smith*, 13 Fed. Rep. 263; *White v. Barber*, 123 U. S. 392, 8 Sup. Ct. Rep. 221; *Wall v. Schneider*, 59 Wis. 352, 13 N. W. Rep. 443; *Shaw v. Clark*, 49 Mich. 384, 13 N. W. Rep. 786; *Bullard v. Smith*, 139 Mass. 492, 2 N. E. Rep. 86; *Samson v. Shaw*, 101 Mass. 145; *Tomblin v. Callen*, 69 Iowa, 229, 28 N. W. Rep. 573; *Logan v. Musick*, 81 Ill. 415; *Hatch v. Douglass*, 48 Conn. 116; *Dunn v. Bell*, 85 Tenn. 581, 4 S. W. Rep. 41; *Pickering v. Cease*, 79 Ill. 328; *McGrew v. Produce Exchange*, 85 Tenn. 572, 4 S. W. Rep. 38; *Pearce v. Foot*, 113 Ill. 228; *Mutual Ins. Co. v. Watson*, 30 Fed. Rep. 653; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. Rep. 1084; *Lawton v. Blitch*, 83 Ga. 663, 10 S. E. Rep. 353; *Lester v. Buel*, 49 Ohio St. 240, 30 N. E. Rep. 821; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. Rep. 862. And see cases cited in notes 336-338, *infra*. Such transactions are not regarded as contrary to public policy in England, and are there valid, in the absence of statutory prohibition. These are held, however, to be gaming and wagering transactions within the meaning of the statute prohibiting such transactions. *Thacker v. Hardy*, 4 Q. B. Div. 685. It has been held, however, that this class of contracts were not gaming contracts within the meaning of statutes avoiding instruments in the hands of bona fide holders if given on a gaming consideration. *Shaw v. Clark*, 49 Mich. 384, 13 N. W. Rep. 786; *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243. But see, *contra*, *Thacker v. Hardy*, 4 Q. B. Div. 685; *Cunningham v. Bank*, 71 Ga. 400; *Grizewood v. Blane*, 11 C. B. 526; *Lyons v. Hodgen*, 90 Ky. 280, 13 S. W. Rep. 1076. That they are wagers within the meaning of a statute, see *McGrew v. Produce Exchange*, 85 Tenn. 572, 4 S. W. Rep. 38.

in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract. If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices."<sup>100</sup>

This intention must be common to both parties. If one of them intends a bona fide sale, and actual delivery if it shall be required, he may enforce the contract, though the other party may have intended a wager on future prices.<sup>101</sup> The fact that the seller has not the article sold at the time of the contract does not render the contract void. It is valid if an actual delivery is intended, though he is to buy the article in the market at the time of delivery, and though a margin may have been deposited as security.<sup>102</sup>

<sup>100</sup> *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. Rep. 49. And see *Barnes v. Smith*, 159 Mass. 344, 34 N. E. Rep. 403. But if the circumstances show that the transaction was a speculation only, and that no delivery was intended, it is void, notwithstanding a rule of the exchange that actual delivery may be exacted. *Beadles v. McElrath*, 85 Ky. 230, 3 S. W. Rep. 152.

<sup>101</sup> *Pixley v. Boynton*, 79 Ill. 351; *Whitesides v. Hunt*, 97 Ind. 191; *Gregory v. Wendell*, 39 Mich. 337; *Bangs v. Hornick*, 30 Fed. Rep. 97; *Williams v. Tiedeman*, 6 Mo. App. 269; *Jones v. Shale*, 34 Mo. App. 302.

<sup>102</sup> *Story v. Solomon*, 71 N. Y. 420; *Appleman v. Fisher*, 34 Md. 540; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160; *Gregory v. Wattown*, 58 Iowa,

*Lotteries.*

In England, and in most, if not all, of our states, lotteries are prohibited by statute. In Webster's Dictionary a "lottery" is defined to be "the distribution of prizes by lot or chance," and this definition has been expressly approved by some of the courts.<sup>108</sup> In an English case the proprietor of a journal had advertised a "missing word competition," the scheme of which was that persons should guess upon the word omitted in a published paragraph, accompanying their guess by a fee, the money so received to be distributed among the successful competitors. The proprietor, after receiving the money, refused to distribute it, and suit was brought against him by a successful competitor. It was held that the transaction was a lottery, as the distribution was to take place by chance, and that the action could not be maintained.<sup>104</sup>

A distribution, however, does not constitute a lottery where no consideration is paid, directly or indirectly, for the right to participate.<sup>105</sup>

711, 12 N. W. Rep. 726; *Cole v. Milmine*, 88 Ill. 349; *Wall v. Schneider*, 59 Wis. 352, 18 N. W. Rep. 443; *Wollcott v. Heath*, 78 Ill. 433; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Bigelow v. Benedict*, 70 N. Y. 202; *Kahn v. Walton*, 48 Ohio St. 195, 20 N. E. Rep. 203; *Jones v. Shale*, 34 Mo. App. 302. Parol evidence is always admissible to show what was the real intention. *Myers v. Tobias* (Pa. Sup.) 16 Atl. Rep. 641; *Clarke v. Foss*, 7 Biss. 540, Fed. Cas. No. 2,852; *Kenyon v. Luther* (Sup.) 4 N. Y. Supp. 498; *Watte v. Wickersham*, 27 Neb. 457, 43 N. W. Rep. 259; *Sprague v. Warren*, 26 Neb. 326, 41 N. W. Rep. 1113; *Boyd v. Hanson*, 41 Fed. Rep. 174; *Gaw v. Bennett*, 153 Pa. St. 247, 25 Atl. Rep. 1114; *Heintz v. Jewell*, 20 Fed. Rep. 592.

<sup>108</sup> *Barclay v. Pearson* [1893] 2 Ch. 154; *Taylor v. Smetten*, 11 Q. B. Div. 210.

<sup>104</sup> *Barclay v. Pearson* [1893] 2 Ch. 154. And see, as to what constitutes a lottery, *Jackson Steel Nail Co. v. Marks*, 4 Ohio Civ. Ct. R. 343; *Caminada v. Hulton*, 64 Law T. 572; gift enterprises, *State v. Bonell*, 42 La. Ann. 1110, 8 South. Rep. 298; *Long v. State*, 73 Md. 527, 21 Atl. Rep. 683; *Id.*, 74 Md. 565, 22 Atl. Rep. 4; *People v. Gillson*, 109 N. Y. 389, 17 N. E. Rep. 343; merchant tailor clubs, *State v. Moren*, 48 Minn. 555, 51 N. W. Rep. 618.

<sup>105</sup> *Yellowstone Kit v. State*, 88 Ala. 196, 7 South. Rep. 338; *Cross v. People*, 18 Colo. 321, 32 Pac. Rep. 821.



### AGREEMENTS CONTRARY TO PUBLIC POLICY

182. Any agreement which is contrary to the policy of our laws, or public policy, because of its mischievous nature or tendency, is illegal and void, though the acts contemplated may not be expressly prohibited either by the common law or by statute.

183. The test of public policy must be applied in each case as it arises, and therefore agreements which have been or may be declared contrary to public policy cannot be exactly classified. The most general are:

- (a) Agreements tending to injure the public service.
- (b) Agreements involving or tending to the corruption of private citizens with reference to public matters.
- (c) Agreements tending to pervert or obstruct public justice.
- (d) Agreements tending to encourage litigation.
- (e) Agreements of immoral tendency.
- (f) Gambling transactions.
- (g) Agreements tending to induce fraud and breach of trust.
- (h) Agreements affecting the freedom or security of marriage, or otherwise in derogation of the marriage relation.
- (i) Agreements in unreasonable restraint of trade, including combinations to prevent competition, control prices, and create monopolies.
- (j) Agreements exempting a person or corporation from liability for negligence.

There are many things which the law does not prohibit in the sense of attaching penalties, but which are so mischievous in their nature and tendency that, on grounds of public policy, they cannot be admitted as the subject of a valid contract. It is clearly to the interest of the public that persons should not be unnecessarily re-

stricted in their freedom to make their own contracts. "It must not be forgotten," it was said by an English judge, "that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider: that you are not lightly to interfere with the freedom of contract."<sup>106</sup>

The interests of the public, however, do require that there shall be some restrictions on the freedom of persons to enter into contracts. If an agreement tends to the corruption of public officers, or to otherwise injure the public service, the public would suffer a greater injury from its enforcement than from a refusal to enforce it; and the same is true of agreements tending to pervert or obstruct public justice, or tending to encourage litigation, or to corrupt the public morals, or to interfere with the freedom or security of marriage, or to impose an unreasonable restraint upon trade. All such agreements are therefore held illegal, as being contrary to public policy. "The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public."<sup>107</sup>

#### **SAME—AGREEMENTS TENDING TO INJURE THE PUBLIC SERVICE.**

**184. Among the agreements which are illegal as tending to injure the public service may be mentioned—**

- (a) Agreements for the sale of, or other traffic in, a public office, or its emoluments.**

<sup>106</sup> Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462.

<sup>107</sup> West Virginia Transp. Co. v. Ohio River Pipe-Line Co., 22 W. Va. 600.

- (b) **Agreements by public officers for greater pay than is fixed by law for performance of official duty; or for less pay where the services are yet to be performed.**
- (c) **Assignment of his future salary, and, under some circumstances, of his pension, by a public officer.**
- (d) **Agreements to influence legislation by personal solicitation of the legislators, or other objectionable means.**
- (e) **Agreements to procure administrative action by public officers by corrupt means. Some, but not all, courts hold that any agreement by a third person, for a compensation, to procure such action, is illegal, because of its tendency to introduce corrupt means.**
- (f) **Agreements by public or quasi public corporations, such as municipal corporations, and railroad, water, or gas companies, which interfere with their performance of the duties which they owe to the public.**

As the public has an interest in the proper performance of their duty by public officers, and would be prejudiced by agreements tending to impair an officer's efficiency, or otherwise interfere with the due execution of the duties of the office, such agreements are contrary to public policy, and void.

*Traffic in Public Offices.*

As stated by Greenwood,<sup>108</sup> therefore, "any contract to appoint one to public office,<sup>109</sup> or involving the sale of a public<sup>110</sup> or quasi

<sup>108</sup> Greenh. Pub. Pol. rule 287, p. 338.

<sup>109</sup> Robertson v. Robinson, 65 Ala. 610; Hager v. Catlin, 18 Hun (N. Y.) 448; Stout v. Ennis, 28 Kan. 706. A contract by an officer, after election, to employ a person as his deputy may be valid. Stout v. Ennis, supra.

<sup>110</sup> Hall v. Gavitt, 18 Ind. 390; Town of Thetford v. Hubbard, 22 Vt. 440; Card v. Hope, 2 Barn. & C. 661; Cardigan v. Page, 6 N. H. 183; Meredith v. Ladd, 2 N. H. 517; Morse v. Ryan, 26 Wis. 356; Love v. Buckner, 4 Bibb

public<sup>111</sup> office, or to do any thing in consideration of the promisee exchanging office with,<sup>112</sup> or securing an office for<sup>113</sup> the promisor, or recommending him for such office,<sup>114</sup> or resigning any office,<sup>115</sup> is void."

As tending to injure the public service may also be mentioned agreements by which a person not occupying a public office secures to himself all or any part of its benefits or emoluments.<sup>116</sup> Other agreements to which this principle applies are agreements by a public officer to pay another for performing the duties of his office for him, for an officer has no authority to delegate his duties to another;<sup>117</sup> but this does not apply where an officer merely employs a deputy or other private person to assist him.<sup>118</sup>

(Ky.) 506; *Groton v. Inhabitants*, 11 Me. 306; *Stroud v. Smith*, 4 Houst. (Del.) 448; *Martin v. Royster*, 8 Ark. 74; *Outon v. Rodes*, 3 A. K. Marsh. (Ky.) 432; *Engle v. Chipman*, 51 Mich. 524, 16 N. W. Rep. 886; *Baldwin v. Bridges*, 2 J. J. Marsh. (Ky.) 7; *Alvord v. Collin*, 20 Pick. (Mass.) at page 428; *Commissioners v. Mulliken*, 7 Blackf. (Ind.) 301; *Ellis v. State*, 4 Ind. 1. The legislature, however, if it sees fit, may provide for the sale of an office, in which case the court must uphold the contract. *Town of Thetford v. Hubbard*, *supra*.

<sup>111</sup> *Blatchford v. Preston*, 8 Term R. 89; *Card v. Hope*, *supra*.

<sup>112</sup> *Stroud v. Smith*, 4 Houst. (Del.) 448.

<sup>113</sup> *Gray v. Hook*, 4 N. Y. 449; *Law v. Law*, 3 P. Wms. 391; *Meguire v. Corwine*, 101 U. S. 111; *Nichols v. Mudgett*, 32 Vt. 548; *Martin v. Wade*, 37 Cal. 168; *Gaston v. Drake*, 14 Nev. 175; *Hunter v. Nolf*, 71 Pa. St. 282; *Morse v. Ryan*, 26 Wis. 356; *Carleton v. Whitcher*, 5 N. H. 196.

<sup>114</sup> *Hartwell v. Hartwell*, 4 Ves. 811.

<sup>115</sup> *Eddy v. Capron*, 4 R. I. 394; *Meacham v. Dow*, 32 Vt. 721. And see *Forbes v. McDonald*, 54 Cal. 98.

<sup>116</sup> *Greenh. Pub. Pol. rule 293*, p. 349. Any agreement between two citizens by which one of them stipulates to pay the other a proportion of the fees and emoluments of a public office which he is seeking, in consideration that that other will aid him in obtaining it, is void, though the agreement is not for the sale of the office; since, among other reasons, it tends to give the other party a dangerous influence over an office which is not intrusted to him, and for the performance of the duties of which he is under no pecuniary or official obligation. *Gray v. Hook*, *supra*.

<sup>117</sup> *Engle v. Chipman*, 51 Mich. 524, 16 N. W. Rep. 886; *Schloss v. Hewlett*, 51 Ala. 266, 1 South. Rep. 263.

<sup>118</sup> *Price v. Caperton*, 1 Duv. (Ky.) 207.

*Agreements Affecting the Compensation of Public Officers.*

As we have seen in another connection, a promise to pay a public officer for performing duties which he is required by law to perform without such compensation, or to pay him more than the fees fixed by law, is void for want of consideration.<sup>119</sup> Such contracts are also illegal as being contrary to public policy.<sup>120</sup> "The rewards of officers," it has been said, "are established by law. Their services are to be performed for those legal rewards; and other private rewards for acts which are required from them as public duties by the laws of their country, and the obligations of their stations, must be regarded as corrupt and illegal exactions. The idea that an officer employed by the public for the performance of a public trust, and paid by his country for his services, may take additional and private compensations for the discharge of his official duties, is wholly inadmissible. \* \* \* If the services engaged by this contract were within the scope of public duty, they were to be performed as a public duty which could not be bought or sold for private gain."<sup>121</sup> The rule does not apply so as to prevent an officer from recovering on a promise to pay him for doing more than he is required by law to do.<sup>122</sup>

<sup>119</sup> Ante, p. 186.

<sup>120</sup> *Weaver v. Whitney*, 1 Hopk. Ch. (N. Y.) 13; *Preston v. Bacon*, 4 Conn. 471; *Neustadt v. Hall*, 58 Ill. 172; *Trundle v. Riley*, 17 B. Mon. (Ky.) 396; *Kick v. Merry*, 23 Mo. 72; *Gilmore v. Lewis*, 12 Ohio, 281; *Brown v. Bank*, (Ind. Sup.) 37 N. E. Rep. 158; *Griffin v. Clay Co.*, 63 Iowa, 413, 19 N. W. Rep. 327; *Adams Co. v. Hunter*, 78 Iowa, 328, 43 N. W. Rep. 208; ante, p. 186, and cases there cited. Bond of indemnity given a sheriff to induce him to do what he was required to do without it. *Mitchell v. Vance*, 5 T. B. Mon. (Ky.) 528. A public officer is not entitled to reward offered for the arrest of a person, where it was his duty to make the arrest without pay. *Smith v. Whildin*, 10 Pa. St. 39; *Gilmore v. Lewis*, 12 Ohio, 281; *Pool v. City of Boston*, 5 Cush. (Mass.) 219; *Stamper v. Temple*, 6 Humph. (Tenn.) 113; *Davies v. Burns*, 5 Allen (Mass.) 349.

<sup>121</sup> *Weaver v. Whitney*, supra.

<sup>122</sup> *Trundle v. Riley*, 17 B. Mon. (Ky.) 396; *McCandless v. Steel Co.*, 152 Pa. St. 139, 25 Atl. Rep. 579; *Carroll v. Tyler*, 2 Har. & G. (Md.) 57. An officer, for instance, may recover a reward offered for the apprehension of a criminal, if it was no part of his duty to make the arrest. *Morrell v. Quarles*, 35 Ala. 544; *Evans v. City of Trenton*, 24 N. J. Law, 764.

It has also been held that an agreement by a public officer, before performance of services, to accept less than the fees fixed by law, is against public policy. In a case involving the validity of such an agreement it was argued that, as the fees belonged to the officer, he could remit the same if he saw proper, and therefore he could contract to do so. The court, however, said: "This is no doubt true as to accrued fees for past services. But a different question is presented where a public officer, prior to the transaction of an official act, agrees to accept a less compensation for the performance of the act than is prescribed by statute. If, by contract, he may take less, why may not the parties contract for an enlarged compensation? We think a contract whereby an officer agrees to accept less or a greater compensation than is prescribed by statute, or whereby he agrees not to avail himself of a statutory mode of enforcing the collection of his fees, is contrary to public policy and void."<sup>123</sup>

*Assignment of Salary or Pension by Officer.*

The rule also applies to the assignment of their salaries by public officers. One of the reasons given by an English judge was that "it is fit that the public servants should retain the means of a decent subsistence, without being exposed to the temptations of poverty."<sup>124</sup> From this it would seem that in England it is immaterial whether the salary is due or not. In this country, however, it is not regarded as contrary to public policy for an officer to assign his salary after it has become due, but an assignment of it before it is due is void. The reason is that an officer is not apt to be as efficient in the performance of his duties after he has assigned his unearned salary.<sup>125</sup>

<sup>123</sup> *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, 33 N. W. Rep. 603.

<sup>124</sup> *Wells v. Foster*, 8 Mees. & W. 149.

<sup>125</sup> *Bliss v. Lawrence*, 48 How. Pr. (N. Y.) 22, 58 N. Y. 442; *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. Rep. 963; *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 25 N. E. Rep. 855; *Beal v. McVicker*, 8 Mo. App. 202; *Schloss v. Hewlett*, 81 Ala. 266, 1 South. Rep. 263; *State v. Williamson* (Mo. Sup.) 23 S. W. Rep. 1054; *Field v. Chipley*, 79 Ky. 260; *King v. Hawkins* (Ariz.) 16 Pac. Rep. 434; *State Nat. Bank v. Fink*, 86 Tex. 308, 24 S. W. Rep. 256; *Brackett v. Blake*, 7 Metc. (Mass.) 335. Contra, *State Bank v. Hastings*, 15 Wis. 78. Assignment of unearned salary by clerks and deputies in city or county clerk's office, *Bangs v.*

So, also, the assignment of a pension may be illegal if it is not granted exclusively for past services. "Where the pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of service which the party has already performed, it is against the policy of the law that it should be assignable."<sup>126</sup>

### *Lobbying Contracts.*

What are known as "lobbying contracts" also fall within this class of illegal agreements. Any agreement to render services in procuring legislative action, either by congress or by a state legislature or by a municipal council, by personal solicitation of the legislators or other objectionable means, is contrary to the plainest principles of public policy, and is void.<sup>127</sup> "A contract for lobby

Dunn, *supra*. The rule applies to an assignment of his fees by an executor before they are ascertained and fixed as provided by statute. In *re Worthington* (Sup.) 22 N. Y. Supp. 19; *Id.*, 141 N. Y. 9, 35 N. E. Rep. 929. "The public service is protected by protecting those engaged in performing public duties; and this—not upon the ground of their private interest, but that of the necessity of securing the efficiency of the public service—by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work at such periods as the law has appointed for their payment. \* \* \* Salaries are by law payable after work is performed, and not before; and while this remains the law it must be presumed to be a wise regulation, and necessary, in the view of the lawmakers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries." *Bliss v. Lawrence*, 48 How. Pr. (N. Y.) at page 22.

<sup>126</sup> *Wells v. Foster*, *supra*. And see *Bliss v. Lawrence*, 58 N. Y. 422 (collecting the English cases). Act Cong. Feb. 28, 1883, makes void any "pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension." See *Loser v. Board*, 92 Mich. 633, 52 N. W. Rep. 956.

<sup>127</sup> *Trist v. Child*, 21 Wall. 441; *Mills v. Mills*, 40 N. Y. 543; *Spaulding v. Ewing*, 149 Pa. St. 375, 24 Atl. Rep. 219; *Clippinger v. Hepaugh*, 5 Watts & S. (Pa.) 315; *Frost v. Belmont*, 6 Allen (Mass.) 152; *Harris v. Roof*, 10 Barb. (N. Y.) 489; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Weed v. Black*, 2 MacArthur (D. C.) 268; *Marshall v. Railroad Co.*, 16 How. 314; *Powers v. Skinner*, 34 Vt. 274; *Howell v. Fountain*, 3 Ga. 176; *Coquillard v. Bearss*, 21 Ind. 479; *McBratney v. Chandler*, 22 Kan. 692; *Frost v. Inhabitants*, 6 Allen (Mass.) 152; *Bryan v. Reynolds*, 5 Wis. 200; *Wood v. McCann*, 6 Dana (Ky.) 366; *Cook v. Shipman*, 24 Ill. 614; *Cary v. W. U. Tel. Co.*

services," it is said in a New York case, "for personal influence, for mere importunities to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them by any other arguments, persuasions, or inducements than as directly and legitimately bear upon the merits of the pending application, is illegal, and against public policy, and void;"<sup>128</sup> and it has been held that a promise to pay a contingent fee on the passage of a bill is void, because such a fee is "a direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature."<sup>129</sup>

The rule, however, does not apply to an agreement, express or implied, for purely professional services, such as the drafting of a petition to set forth a claim for presentment to the legislature, attending the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more objectionable.<sup>130</sup>

47 Hun (N. Y.) 610. "It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action." *Mills v. Mills*, supra.

<sup>128</sup> *Brown v. Brown*, 34 Barb. (N. Y.) 533. And see *Sweeney v. McLeod*, 15 Or. 330, 15 Pac. Rep. 275.

<sup>129</sup> *Wood v. McCann*, 6 Dana (Ky.) 366. And see *Marshall v. Railroad Co.*, supra; *Coquillard v. Bearss*, supra; *Harris v. Roof*, supra; *Weed v. Black*, supra; *Chippewa V. R. Co. v. Railway Co.*, 75 Wis. 224, 44 N. W. Rep. 17. But see, contra, *Bryan v. Reynolds*, supra; *Workman v. Campbell*, 46 Mo. 305; *Burbridge v. Fackler*, 2 MacArthur (D. C.) 407; *Denison v. Crawford Co.*, 48 Iowa, 211.

<sup>130</sup> *Trist v. Child*, 21 Wall. 441; *Bryan v. Reynolds*, 5 Wis. 200; *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. Rep. 633 (affirming [Sup.] 21 N. Y. Supp. 566.)



### *Corruption of Public Officers.*

"Any contract," says Greenhood,<sup>121</sup> "contemplating the use of secret influence with public officers,<sup>122</sup> or calculated to induce the use of such influence,<sup>123</sup> is void, especially when one of the parties is a public officer himself,<sup>124</sup> though he be but a representative of a foreign government, and his position be merely honorary."<sup>125</sup> Under this rule it is held by all the courts that any agreement by which a person is to endeavor to procure a government contract for another by the use of corrupt means is illegal. As to this there can be no question. Some of the courts hold that such an agreement, though a compensation is to be paid, is not illegal in itself, but becomes so only where corrupt means are to be resorted to; and this would seem to be the better doctrine.<sup>126</sup> Other courts,

<sup>121</sup> Greenh. Pub. Pol. p. 357, rule 300.

<sup>122</sup> *Murray v. Wakefield*, 9 Mo. App. 591; *Hutchen v. Gibson*, 1 Bush (Ky.) 270. To use influence in procuring appointment to office. *Gray v. Hook*, 4 N. Y. 449; post, p. 423. To use influence to procure session of legislature at a particular place. *Thorne v. Yontz*, 4 Cal. 321. To use influence, or agreement tending to encourage use of influence, with the prosecuting attorney in respect to criminal prosecutions. *Ormerod v. Dearman*, 100 Pa. St. 561; *Wight v. Rindakopf*, 43 Wis. 344; *Willey v. Collier*, 7 Md. 273; *Rhodes v. Neal*, 64 Ga. 704; *Barron v. Tucker*, 53 Vt. 338. Agreement for compensation to use influence to procure pardon of a convict, or a commutation of sentence. *Haines v. Lewis*, 54 Iowa, 301, 6 N. W. Rep. 495; *O'Reilly v. Cleary*, 8 Mo. App. 186; *Kribben v. Haycraft*, 26 Mo. 396; *Hatzfield v. Gulden*, 7 Watts (Pa.) 152; *Norman v. Cole*, 3 Esp. 253. But see *Formby v. Pryor*, 15 Ga. 258; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. Rep. 1060; *Rau v. Boyle*, 5 Bush (Ky.) 253; *Timothy v. Wright*, 8 Gray (Mass.) 522; *Chadwick v. Knox*, 31 N. H. 226,—sustaining such an agreement where no corrupt means were to be resorted to.

<sup>123</sup> *Trist v. Child*, 21 Wall. 441; *Tool Co. v. Norris*, 2 Wall. 45; *Ormerod v. Dearman*, 100 Pa. St. 561; *Bowman v. Coffroth*, 59 Pa. St. 19; *O'Hara v. Carpenter*, 23 Mich. 410.

<sup>124</sup> *Oscanyan v. Arms Co.*, 103 U. S. 261; *Hovey v. Storer*, 63 Me. 486.

<sup>125</sup> Note 138, *infra*.

<sup>126</sup> *Lyon v. Mitchell*, 36 N. Y. 235; *Southard v. Boyd*, 51 N. Y. 177; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. Rep. 532; *Winpenny v. French*, 18 Ohio St. 469; *Barry v. Capen*, 151 Mass. 99, 23 N. E. Rep. 735; *Formby v. Pryor*, 15 Ga. 258; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. Rep. 1060; *Chadwick v. Knox*, 31 N. H. 226. It has even been held by the New York court that the fact that the person employed to procure the contract has intimate rela-

however, have held that any such agreement, for a compensation, is illegal, because of its tendency to introduce corrupt means. "Considerations," it has been said by the supreme court of the United States, "as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."<sup>127</sup>

It has also been held that a contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country, even though it may not be invalid according to the laws and customs of the foreign country. The courts will refuse to enforce such a contract, "not from any consideration of the interests of that government, or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people."<sup>128</sup>

As in the case of contracts to render services in procuring the passage of acts and ordinances, so also in the case of contracts to render services in procuring administrative action by government officials, the services contracted for may be legitimate; and, where this is so, the contract will be enforced. If the contract does not

tions with the government agents, and can probably, therefore, influence their action much more readily than others, does not forbid his employment. *Southard v. Boyd*, supra.

<sup>127</sup> *Tool Co. v. Norris*, 2 Wall. 45; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Elkhart County Lodge v. Crary*, 98 Ind. 238; *Meguire v. Corwine*, 101 U. S. 108; *Devlin v. Brady*, 36 N. Y. 531; *Cook v. Shipman*, 24 Ill. 614, 51 Ill. 316; *Spence v. Harvey*, 22 Cal. 336; *Caton v. Stewart*, 76 N. C. 357.

<sup>128</sup> *Oscanyan v. Arms Co.*, 103 U. S. 261.

tend to induce the use of corrupt means, and in some jurisdictions, as we have seen, if corrupt means are not to be resorted to, the contract is valid.<sup>139</sup>

*Agreements by Public or Quasi Public Corporations.*

As falling within this class of illegal contracts may also be mentioned agreements by public or quasi public corporations which interfere with their duties to the public.<sup>140</sup> Railroad companies and other common carriers, for instance, are regarded to some extent as public servants, and it is contrary to public policy for them to make any agreement whereby they may be hindered in serving the public. For this reason most courts have refused to uphold subscriptions or other contracts with railroad companies, under which they bind themselves to build their road along a particular route, or to locate their station or depot at a particular point or not at a particular point.<sup>141</sup> Some courts, however, sustain such a contract where the company is not restricted from locating lines, stations, or depots along other routes or at other points also, or otherwise doing whatever the public convenience may require.<sup>142</sup>

<sup>139</sup> *Sedgwick v. Stanton*, 14 N. Y. 289; *Burbridge v. Fackler*, 2 MacArthur (D. C.) 407; *Painter v. Dunn*, 40 Pa. St. 467; ante, p. 422. Contract to procure by legitimate means a pardon, commutation of sentence, etc., in a proper case. Note 132, supra.

<sup>140</sup> "Any contract which will disable a public or quasi public corporation from performing the duty which it has undertaken, or which has been imposed upon it, for the public weal, or compels it to make the public accommodation or convenience subservient to its private interests, is void." Greenh. Pub. Pol. rule 269; *Chicago Gas-Light & Coke Co. v. Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169. As to illegal contracts by a city, see *City of Jackson v. Bowman*, 39 Miss. 671. As to the power of a city to grant exclusive franchises, see *Costar v. Brush*, 25 Wend. (N. Y.) 628.

<sup>141</sup> *Pacific R. Co. v. Seeley*, 45 Mo. 212; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Marsh v. Railroad Co.*, 64 Ill. 414; *St. Joseph & D. R. Co. v. Ryan*, 11 Kan. 602; *Holladay v. Patterson*, 5 Or. 182; *Bestor v. Wathen*, 60 Ill. 138; *Woodstock Iron Co. v. Extension Co.*, 129 U. S. 643, 9 Sup. Ct. Rep. 402; *Florida C. & P. R. Co. v. State*, 81 Fla. 482, 18 South. Rep. 103; *Linder v. Carpenter*, 62 Ill. 309; *St. Louis R. Co. v. Mathers*, 71 Ill. 592, 104 Ill. 257; *Williamson v. Railroad Co.*, 53 Iowa, 126, 4 N. W. Rep. 870.

<sup>142</sup> *Louisville, N. A. & C. R. Co. v. Sumner*, 106 Ind. 55, 5 N. E. Rep. 404; *Swartout v. Railroad Co.*, 24 Mich. 389; *Williamson v. Railroad Co.*, 53 Iowa,

So, also, any other agreement by a railroad company or other corporation chartered as a common carrier, or for other quasi public purposes, as in the case of water or gas companies, by which it prevents itself from performing the duties which it owes to the public, is void.<sup>143</sup> A combination, therefore, between two railroad companies owning competing lines, by which one line is to be discontinued or leased to the other, will not be sustained.<sup>144</sup> This principle, it has been said, does not apply to individuals engaged in the business of common carriers. The owner of one line of steamers, it has been held, may make a contract with an individual owner of a competing line, by which the latter is to discontinue his vessels.<sup>145</sup>

Under this head may also be mentioned contracts by which a common carrier or other quasi public corporation makes an undue discrimination in favor of a particular person. Such a contract is not only generally prohibited by statute, but is contrary to public policy independently of any statutory provision on the subject.<sup>146</sup>

128, 4 N. W. Rep. 870; *First Nat. Bank v. Hendrie*, 49 Iowa, 402; *Taylor v. Railroad Co.*, 25 Iowa, 371; *Harris v. Roberts*, 12 Neb. 631, 12 N. W. Rep. 89; *International R. Co. v. Dawson*, 62 Tex. 260; *Texas & St. L. R. Co. v. Robards*, 60 Tex. 545.

<sup>143</sup> *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. Rep. 478; *York R. Co. v. Winans*, 17 How. 30; *Peoria & R. I. R. Co. v. Coal Valley Min. Co.*, 68 Ill. 489; *Gibbs v. Gas Co.*, 130 U. S. 390, 9 Sup. Ct. Rep. 553; *Peters v. Ryland*, 20 Pa. St. 497; *State v. Railroad Co.*, 29 Conn. 538; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650.

<sup>144</sup> *Thomas v. Railroad Co.*, 101 U. S. 71; *Greenh. Pub. Pol.* 318 (collecting cases); *Gulf, C. & S. F. Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. Rep. 156. This is expressly prohibited or regulated by statute in most states. Transfer of franchises and other property by one railroad company to another. *Clark v. Railroad Co.*, 4 Neb. 458, 5 Neb. 314.

<sup>145</sup> *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. Rep. 363. But see *Anderson v. Jett*, 89 Ky. 375, 12 S. W. Rep. 670.

<sup>146</sup> *Indianapolis, D. & S. R. Co. v. Erwin*, 118 Ill. 250, 8 N. E. Rep. 862; *Scofield v. Railroad Co.*, 43 Ohio St. 571, 3 N. E. Rep. 907; *Chesapeake & P. Tel. Co. v. Telegraph Co.*, 66 Md. 399, 7 Atl. Rep. 809. It has been held however, that there is nothing to prevent a quasi public corporation from granting exclusive privileges, as where a railroad company gives a telegraph company the exclusive privilege of operating a telegraph line along its road; but there is high authority to the contrary. *W. U. Tel. Co. v. Railroad Co.*, 86 Ill. 246; *Canadian Pac. R. Co. v. Telegraph Co.*, 17 Can. S. C. R.

*Agreements Affecting the Government.*<sup>147</sup>

There are many agreements which, though not tending to injure the public service, injuriously affect the government itself in some other way, and which are therefore illegal, as contrary to public policy.<sup>148</sup> These agreements are collected by Greenhoo<sup>d</sup>,<sup>149</sup> and may be shortly stated as follows: (1) Agreements contemplating the appropriation of public money for purposes not sanctioned by law.<sup>150</sup> (2) Agreements which seek to secure to strangers a gratuity which the public has offered for services rendered; as in the case of an agreement to secure to a stranger bounties offered by the government for military services.<sup>151</sup> (3) Agreements which seek to secure to a stranger the benefit of a privilege granted by the government to the promisor; as, for instance, where a person who has received from the government a license to trade with the Indians agrees for a consideration to share the profits with a stranger.<sup>152</sup> (4) Agreements with an alien enemy. We have already sufficiently considered this question in treating of the capacity of parties to enter into contracts.<sup>153</sup>

151. *Contra*, *W. U. Tel. Co. v. Telegraph Co.*, 65 Ga. 160. Contract between railroad and ferry company. *Wiggins Ferry Co. v. Railroad Co.*, 73 Mo. 389.

<sup>147</sup> Though this paragraph is not deemed important enough, in view of the limited size of the book, to be covered by specific black letter text, it is too important to omit altogether even from an elementary work, and for this reason it has been inserted.

<sup>148</sup> "Contracts which take advantage of the depreciation of the national currency, or which contemplate speculation on such depreciation, are valid." *Greenh. Pub. Pol.* rule 305, p. 370. An agreement, on borrowing \$1,500 in gold, which is worth more than paper currency, to repay \$2,500 in currency, is valid, *Cox v. Smith*, 1 Nev. 133; and so are agreements for the purchase and sale of gold, *Brown v. Speyers*, 20 Gratt. (Va.) 296; *Cooke v. Davis*, 53 N. Y. 318; *Cameron v. Durkheim*, 55 N. Y. 425; *Peabody v. Speyers*, 56 N. Y. 230.

<sup>149</sup> *Greenh. Pub. Pol.* rules 302-315.

<sup>150</sup> *Capehart v. Rankin*, 3 W. Va. 571.

<sup>151</sup> *Decker v. Saltsman*, 1 Hun (N. Y.) 421.

<sup>152</sup> *Gould v. Kendall*, 15 Neb. 549, 19 N. W. Rep. 483.

<sup>153</sup> *Ante*, p. 216. For a good statement of the rules on this point, and collection of the cases, see *Greenh. Pub. Pol.* rules 306-315. Such an agreement has been said to be void, not on any ground of public policy, but because "it was a principle of the common law that trading with an enemy,

### SAME—AGREEMENTS PROMOTIVE OF NONOFFICIAL CORRUPTION.

185. The illegal agreements which may be classified under this head are:

- (a) Agreements by a private citizen to violate a duty which he owes to the public.
- (b) Agreements tending to impair the integrity of public elections.

There is a class of agreements of which Greenhood treats as contracts promotive of nonofficial corruption, and which he divides into contracts involving the corruption of private citizens with reference to public matters, and contracts affecting the integrity of public elections.<sup>184</sup>

Among the agreements which he has treated under the first head, and which are deemed contrary to public policy and illegal, are agreements in consideration of a person's forbearing to petition for the repeal of a public law,<sup>185</sup> or to oppose on public grounds any measure or proceeding before a legislative body,<sup>186</sup> agreements tending to suppress inquiry by the legislature into matters of public concern,<sup>187</sup> agreements in consideration of a person's opposing<sup>188</sup> or of his approving or not opposing a public improvement or other public project,<sup>189</sup> or withdrawing his petition for such an improvement.<sup>190</sup>

without the king's license, was illegal in British subjects," *Potts v. Bell*, 8 Term R. 548; and following this dictum some writers class such agreements among those in breach of express rules of the common law.

<sup>184</sup> *Greenh. Pub. Pol.* p. 383.

<sup>185</sup> *Reed v. Warehouse Co.*, 2 Mo. App. 82.

<sup>186</sup> *Pingry v. Washburn*, 1 Aik. (Vt.) 264. This rule does not apply to opposition to private legislation on purely private grounds. *Greenh. Pub. Pol.* rule 317, p. 384.

<sup>187</sup> *Usher v. McBratney*, 3 Dill. 385, Fed. Cas. No. 16,805.

<sup>188</sup> *Slocum v. Wooley*, 43 N. J. Eq. 451, 11 Atl. Rep. 264.

<sup>189</sup> *Howard v. Independent Church*, 18 Md. 451; *Maguire v. Smock*, 42 Ind. 1; *Smith v. Applegate*, 23 N. J. Law, 352. Where the opposition is on purely private grounds, it has been held that the rule does not apply. *Weeks v. Lippincott*, 42 Pa. St. 474.

<sup>190</sup> *Jacobs v. Toblason*, 65 Iowa, 245, 21 N. W. Rep. 590.

Any agreement which tends to impair the integrity of public elections is clearly contrary to public policy.<sup>161</sup> "Every voter is bound to use his influence to promote the public good according to his own honest opinions and convictions of duty, and if, for money or other personal profit, he agrees to exert his influence against what he believes to be for the public good, he is corrupt, and the agreement void."<sup>162</sup> A promise, therefore, in consideration of the promisee's voting for the promisor for a public office,<sup>163</sup> or procuring his nomination,<sup>164</sup> or aiding in procuring his election,<sup>165</sup> or of withdrawing himself as a candidate for election,<sup>166</sup> or a promise to pay money if a certain candidate shall be elected, is illegal and void. A bet on the result of an election is illegal even in the absence of a statutory prohibition.<sup>167</sup>

#### **SAME—AGREEMENTS TENDING TO PERVERT OR OBSTRUCT PUBLIC JUSTICE.**

**186.** Any agreement which tends to pervert or obstruct public justice is contrary to public policy, and void.

**187. COMPOUNDING CRIME—**An agreement to stifle a criminal prosecution is illegal. This, however, does not

<sup>161</sup> A person who furnishes liquor or refreshments to electors at the request of another, for the purpose of influencing them in their votes, cannot recover therefor. *Duke v. Asbee*, 11 Ired. (N. C.) 112; *Greenh. Pub. Pol.* p. 389.

<sup>162</sup> *Nichols v. Mudgett*, 32 Vt. 546; *Roby v. Carter* (Tex. Civ. App.) 25 S. W. Rep. 725.

<sup>163</sup> *Nichols v. Mudgett*, *supra*. As we have seen, these kinds of agreements are also objectionable as tending to injure the public service. *Ante*, p. 422.

<sup>164</sup> *Liness v. Hesing*, 44 Ill. 113.

<sup>165</sup> *Stout v. Ennis*, 28 Kan. 706; *Swayze v. Hull*, 8 N. J. Law, 54; *Ham v. Smith*, 87 Pa. St. 63. This does not apply to "an agreement to pay for open advocacy of the election of a candidate, or for legitimate political work." *Greenh. Pub. Pol.* 393; *Murphy v. English*, 64 How. Pr. (N. Y.) 362; *Sizer v. Daniels*, 66 Barb. (N. Y.) 426.

<sup>166</sup> *Robinson v. Kalbfleish*, 5 Thomp. & C. (N. Y.) 212.

<sup>167</sup> *Lockhart v. Hullinger*, 2 Ill. App. 465; *Gordon v. Casey*, 23 Ill. 70; *Guyman v. Burlingame*, 36 Ill. 201; *Vischer v. Yates*, 11 Johns. (N. Y.) 23; *McAllister v. Hoffman*, 16 Serg. & R. (Pa.) 146; *Wroth v. Johnson*, 4 Har. & McH. (Md.) 284; *Gregory v. King*, 58 Ill. 169 (in this case the bet was made in one state on the result of a presidential election in another); *Greenh. Pub. Pol.* 391.

prevent a contract for the purpose of making reparation to the person injured by a crime, if there is no agreement not to prosecute.

**EXCEPTIONS**—(a) It may possibly be lawful to settle for an assault and battery, and agree not to prosecute, if it did not inflict serious bodily harm, nor amount to a breach of the peace.

(b) In some states parties are permitted by statute to settle for certain misdemeanors.

**188. ARBITRATION**—Agreements to refer matters to arbitration as a condition precedent to suit are valid; but it is otherwise where the agreement is to refer to arbitration alone, and not to sue at all.

Any agreement which tends to pervert or obstruct public justice, even though it may not amount to a crime,<sup>188</sup> is illegal, as being contrary to public policy. If an agreement, for instance, tends to induce a witness to perjure himself, or to give false testimony through bias, or if it tends to induce parties to procure false testimony, it will not be enforced.<sup>189</sup> In an Alabama case a party had promised to give a witness, for attending court, a sum of money in excess of his legal fees, the amount of the compensation to depend on the promisor's success in the suit, and the agreement was

<sup>188</sup> Clark, Cr. Law, pp. 122, 322, and cases cited; *Buck v. Bank*, 27 Mich. 293.

<sup>189</sup> *Gillett v. Logan Co.*, 67 Ill. 256; *Goodrich v. Tenney*, 41 Ill. App. 331; *Id.*, 144 Ill. 422, 83 N. E. Rep. 44; *Patterson v. Donner*, 48 Cal. 369; *Greenh. Pub. Pol.* p. 441, and cases cited; *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Paton v. Stewart*, 78 Ill. 481; *Gillett v. Logan Co.*, 67 Ill. 256. A contract between a physician and a party injured by a railroad company, that the physician shall go with the injured party to the counsel and medical advisers of the company, and explain the nature and extent of the injuries, and receive as compensation for doing so an amount dependent on the amount awarded by the company, is illegal and void. *Thomas v. Caulkett*, 57 Mich. 392, 24 N. W. Rep. 154. A contract by which a party to a suit employs another to search for witnesses, and to ascertain the names of persons acquainted with the facts and circumstances of the case, and to procure such other testimony as will procure a verdict in his favor, is clearly within this rule, and void. *Quirk v. Muller* (Mont.) 86 Pac. Rep. 1077.



held void. "Such contracts," said the court, "are against sound policy, because their inevitable tendency is, if not to invite to perjury, at least to sway the mind of the witness, by giving him the interest of a party to the cause, and thus contaminate the stream of justice at its source."<sup>170</sup> So, also, agreements are illegal if they contemplate the suppression of lawful evidence.<sup>171</sup>

All agreements, it is said in a late Indiana case, relating to proceedings in courts, civil or criminal, which may involve anything inconsistent with the impartial course of justice, are void, though not open to the charge of actual corruption, and regardless of the good faith of the parties, or of the fact that no evil resulted therefrom.<sup>172</sup>

### *Compounding Crime.*

The most obvious example of agreements tending to obstruct public justice are agreements to stifle criminal prosecutions. From the earliest times such agreements have been condemned as unlawful. "You shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of benefit or profit to yourself."<sup>173</sup> Not only is an

<sup>170</sup> Dawkins v. Gill, 10 Ala. 206. There are many cases which hold that an agreement by a party to pay a witness compensation in addition to his legal fees is contrary to public policy. For a full statement of the rules and exceptions, and a collection of the cases, see Greenh. Pub. Pol. p. 441.

<sup>171</sup> Greenh. Pub. Pol. p. 441. As, for instance, where an attorney for a consideration agrees with a person accused of crime to procure the release from jail of a witness against him, so that the witness may be gotten away. Crisup v. Grosslight, 79 Mich. 380, 44 N. W. Rep. 621. And see Bostick v. M'Claren, 2 Brev. (S. C.) 275; Badger v. Williams, 1 D. Chip. (Vt.) 137; Thompson v. Whitman, 4 Jones (N. C.) 47. Regulating disclosure of witness. Wight v. Rindskopf, 43 Wis. 344. Asserting unjust claims. Rhodes v. Sparks, 6 Pa. St. 473.

<sup>172</sup> Brown v. Bank (Ind. Sup.) 37 N. E. Rep. 158. In this case it was held that a contract made by a justice of the peace before whom an affidavit has been filed charging with larceny a person who has fled to a foreign country, and therefore beyond his jurisdiction, whereby, in case the justice secures his arrest, and the return of the stolen property, he is to receive a percentage thereof, is void as against public policy.

<sup>173</sup> Williams v. Bayley, L. R. 1 H. L. 200. And see Collins v. Blantern, 2 Wils. 341, 1 Smith, Lead. Cas. 387, notes; Henderson v. Palmer, 71 Ill. 579; Roll v. Raguet, 4 Ohio, 400; Town of Sharon v. Gager, 46 Conn. 189; Mc-

agreement not to prosecute a person for a crime void on the ground that it is against public policy, but it is void because the agreement is in itself a crime.<sup>174</sup>

It has been said that this rule is subject to exceptions in cases where civil and criminal remedies coexist, and that it is permissible in some cases to compromise with the offender, and agree not to prosecute him. In an English case it was said: "We shall probably be safe in laying it down that the law will permit a compromise of all offenses, though made the subject of a criminal prosecution, for which offenses the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offense is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it."<sup>175</sup> And in the same case, on writ of error, it was said: "We have no doubt that in all offenses which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in case of an assault he may also undertake not to prosecute on behalf of the

*Mahan v. Smith*, 47 Conn. 221; *Chandler v. Johnson*, 39 Ga. 85; *Schultz v. Culbertson*, 46 Wis. 313, 1 N. W. Rep. 19; *Wheaton v. Ansley*, 71 Ga. 35; *Meech v. Lee*, 82 Mich. 274, 46 N. W. Rep. 383; *Ricketts v. Harvey*, 106 Ind. 564, 6 N. E. Rep. 325; *Nat. Bank of Oxford v. Kirk*, 90 Pa. St. 49; *Ormerod v. Dearman*, 100 Pa. St. 561; *Gorham v. Keyes*, 137 Mass. 583; *Pearce v. Wilson*, 111 Pa. St. 14, 2 Atl. Rep. 99; *Dionne v. Matzenbaugh*, 49 Ill. App. 527; *Peed v. McKee*, 42 Iowa. 689; *Mall v. Willett*, 57 Iowa, 705, 11 N. W. Rep. 661; *Friend v. Miller*, 52 Kan. 139, 34 Pac. Rep. 397; *Partridge v. Hood*, 120 Mass. 403; *Atwood v. Fisk*, 101 Mass. 363; *Rogers v. Blythe*, 51 Ark. 519, 11 S. W. Rep. 822; *Smith v. Steele*, 80 Iowa, 738, 45 N. W. Rep. 912; *Scharmer v. Farwell*, 56 Ill. 542; *Foley v. Greene*, 14 R. I. 618; *Wolf v. Fletemeyer*, 83 Ill. 418. A note, mortgage, or other instrument given to suppress a prosecution for larceny or embezzlement is void. See the cases above cited. A prosecution for seduction cannot be compounded. *Budd v. Rutherford*, 4 Ind. App. 386, 30 N. E. Rep. 1111. Nor can a prosecution for obstructing a highway. *Amestoy v. Transit Co.*, 95 Cal. 311, 30 Pac. Rep. 550. It makes no difference whether the agreement is express or implied. *Janis v. Roentgen*, 52 Mo. App. 114.

<sup>174</sup> Clark, Cr. Law, p. 329.

<sup>175</sup> Keir v. Leeman, 6 Q. B. 321.

public. It may be so, but we are not disposed to extend this any further."<sup>176</sup> In the case mentioned the agreement was in consideration that the plaintiff, being the prosecutor of an indictment against the defendant for an assault and a riot and the obstruction of a public officer, would not proceed further on the indictment; and it was held illegal because the riot and obstruction of a public officer were matters of public concern which could not be thus stifled.

It may probably be permissible to settle and agree not to prosecute for an assault and battery, if it does not inflict grievous bodily harm, or amount to a breach of the peace, but, according to the better opinion, not otherwise. Of course, persons may always settle any claims they may have against each other, even though the claim may arise from the crime of one of them, as from larceny or embezzlement, provided there is no agreement not to prosecute for the crime.<sup>177</sup> It is the stifling of prosecutions which renders such agreements invalid. In some states parties are expressly permitted by statute to compromise prosecutions for certain misdemeanors.

#### *Reference to Arbitration.*

Agreements to refer matters in dispute to arbitration are regarded as attempts to "oust the jurisdiction of the courts," and are not necessarily enforced. The most common illustrations of such agreements are provisions in a building or construction contract for determination of questions by the architect or engineer, and in insurance policies for submission to arbitrators to determine the loss, though of course they are not limited to these contracts. It is said that a condition in a contract that disputes arising out of it shall be referred to arbitration is good where the amount of damage sustained by a breach of the contract is to be ascertained by

<sup>176</sup> *Keir v. Leeman*, 9 Q. B. 371. But see *Fisher v. Apollinaris Co.*, L. R. 10 Ch. 297.

<sup>177</sup> *Flower v. Sadler*, 10 Q. B. Div. 572; *Nickelson v. Wilson*, 80 N. Y. 382; *Webber v. Barrett*, 6 N. Y. Supp. 434, 52 Hun, 612; *Id.*, 125 N. Y. 18, 25 N. E. Rep. 1068; *Bothwell v. Brown*, 51 Ill. 234; *School Dist. No. 61 v. Alderson*, 6 Dak. 145, 41 N. W. Rep. 466; *Cass County Bank v. Bricker*, 34 Neb. 516, 52 N. W. Rep. 575; *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. Rep. 931; *Schommer v. Farwell*, 56 Ill. 542.

specified arbitration before any right of action arises,<sup>178</sup> but that it is illegal where all the matters in dispute, of whatever sort, are to be referred to arbitrators, and to them alone. In the first case a condition precedent to the accrual of a right of action is imposed, while in the second it is attempted to prevent any right of action accruing at all, and this cannot be permitted.<sup>179</sup> The courts will generally construe arbitration clauses so as to uphold them.

### **SAME—ENCOURAGEMENT OF LITIGATION—CHAMPERTY AND MAINTENANCE.**

189. In most states an agreement amounting to maintenance or champerty is considered contrary to public policy because of its tendency to encourage litigation. In some states, however, the doctrine is scarcely recognized.

"Maintenance" is defined in the old books as the officious intermeddling in a suit by one who has no interest therein, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it.<sup>180</sup> "Champerty" is defined as a bargain by a person with a plaintiff or defendant to divide the land or other matter

<sup>178</sup> *Scott v. Avery*, 5 H. L. Cas. 811; *Delaware & H. Canal Co. v. Coal Co.*, 50 N. Y. 250; *Hamilton v. Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. Rep. 133; *Holmes v. Richet*, 56 Cal. 307; *Smith v. Railroad Co.*, 36 N. H. 458; *Hudson v. McCartney*, 33 Wis. 331; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, 10 N. W. Rep. 504; *Berry v. Carter*, 19 Kan. 135; *Reed v. Insurance Co.*, 138 Mass. 572; *Wood v. Hartshorn*, 100 Mass. 117; *Denver & N. O. Const. Co. v. Stout*, 3 Colo. 61, 5 Pac. Rep. 627; *Mentz v. Insurance Co.*, 79 Pa. St. 478; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407, 8 Atl. Rep. 589.

<sup>179</sup> *Edwards v. Insurance Soc.*, 1 Q. B. Div. 596; *Hurst v. Litchfield*, 39 N. Y. 377; *Viney v. Bignold*, 20 Q. B. Div. 172; *Chamberlain v. Railroad Co.*, 54 Conn. 472, 9 Atl. Rep. 244; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. Rep. 354; *White v. Railroad Co.*, 135 Mass. 216; *Phoenix Ins. Co. v. Badger*, 53 Wis. 288; *Mentz v. Insurance Co.*, 79 Pa. St. 480; *Gray v. Wilson*, 4 Watts (Pa.) 39; *Reed v. Insurance Co.*, 138 Mass. 572; *Allegre v. Insurance Co.*, 6 Har. & J. (Md.) 408; *Gere v. Insurance Co.*, 67 Iowa, 272, 23 N. W. Rep. 137, and 25 N. W. Rep. 159; *Kinney v. Association*, 35 W. Va. 385, 14 S. E. Rep. 8; *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. Rep. 571; *Supreme Council Order of Chosen Friends v. Garrigus*, 104 Ind. 133, 3 N. E. Rep. 818; *Louisville R. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. Rep. 153.

<sup>180</sup> 4 Bl. Comm. 134; 1 Hawk. P. C. 249.

sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit or defense at his own expense. In other words, champerty is "maintenance aggravated by an agreement to have a part of the thing in dispute."<sup>181</sup> Some courts have held that the champertor need not carry on the suit at his own expense,—that it may be where an attorney agrees to conduct a suit for a compensation contingent on success;<sup>182</sup> but the weight of authority is to the contrary. Champerty and maintenance are crimes under the common law in England, and are recognized as crimes at common law in many of our states, and the illegality of such agreements might well be based in those jurisdictions on their criminal character. In many jurisdictions, however, neither maintenance nor champerty is recognized as a crime, but they are held to render agreements illegal on the ground of public policy. In some of our states the doctrine is scarcely recognized at all, the courts considering that, because of the difference in the state of society in England and in this country, the reasons which make the doctrine salutary or necessary there do not exist here.<sup>183</sup>

From the earliest times in England it has been considered contrary to public policy for a person to buy an interest in another's quarrel, or to incite another to litigation by offers of assistance, par-

<sup>181</sup> 4 Bl. Comm. 135; 1 Hawk. P. C. 257; *Thompson v. Reynolds*, 73 Ill. 11; *Torrence v. Shedd*, 112 Ill. 466.

<sup>182</sup> *Lathrop v. Amherst Bank*, 9 Metc. (Mass.) 489. *Contra*, *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. Rep. 730; *Phillips v. Commissioners*, 119 Ill. 626, 10 N. E. Rep. 230.

<sup>183</sup> *Richardson v. Rowland*, 40 Conn. 565; *Stoddard v. Mix*, 14 Conn. 12; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. Rep. 169; *Danforth v. Streeter*, 23 Vt. 490; *Brown v. Bigne*, 21 Or. 200, 28 Pac. Rep. 11; *Bayard v. McLane*, 3 Har. (Del.) 139; *Schamp v. Schenck*, 40 N. J. Law, 195; *Hoffman v. Vallejo*, 45 Cal. 564; *Bentlnck v. Franklin*, 38 Tex. 458; *Sherley v. Riggs*, 11 Humph. (Tenn.) 53. The common law in relation to champerty has been virtually abolished or superseded by statute in Michigan, New York, and several other states. *Willey v. Crane*, 63 Mich. 720, 30 N. W. Rep. 327. In New York it is abolished, except in so far as it is embodied in statutes in reference to certain cases affecting the title to lands, and prohibiting the purchase of claims by attorneys for the purpose of suing on them. See *Bundy v. Newton*, 19 N. Y. Supp. 734, 65 Hun, 619; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. Rep. 169; *Coughlin v. Railroad Co.*, 71 N. Y. 443; *Oisher v. Lazzarone*, 15 N. Y. Supp. 933, 61 Hun, 623.

ticularly where he expects to be paid therefor. "A contract," says Greenhoo, "by which a stranger is to sustain the expense of the prosecution or defense of litigation, especially when he is to have an interest in the result thereof, is void;" and the rule thus laid down is sustained by numerous cases, both in England and in this country.<sup>184</sup>

Illustrations of maintenance are where a stranger to a cause of action induces the person who has the right of action to sue by promising to save him harmless from any liability for costs, or to pay the costs in case of failure in the action.<sup>185</sup> In a late English case it was held that a person who had given a bond for costs of a suit brought by another against a third person to recover penalties which were not due to him (the obligor) was guilty of maintenance, on the ground that his conduct "tended to promote unnecessary litigation."<sup>186</sup> Prior to this case it was deemed necessary, in order to avoid a contract, that there should be something vexatious in the maintenance, and that mere assistance was not enough; that maintenance "is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defenses which they have no right to make."<sup>187</sup> Though there are some cases to the contrary, the latter is probably the general rule in this country where the doctrine of maintenance is recognized at all.<sup>188</sup>

It is not regarded as unlawful maintenance for a person to assist another in litigation, if he is himself interested in the subject of the litigation,<sup>189</sup> or if he in good faith believes that he is

<sup>184</sup> Greenh. Pub. Pol. rule 324; *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Kerr v. Brunton*, 24 U. C. Q. B. 390; *Knox v. Martin*, 8 N. H. 154. And see the cases in the following notes.

<sup>185</sup> *Wheeler v. Pounds*, 24 Ala. 472; *Low v. Hutchinson*, 37 Me. 196; *Martin v. Amos*, 13 Ired. (N. C.) 201.

<sup>186</sup> *Bradlaugh v. Newdegate*, 11 Q. B. Div. 10.

<sup>187</sup> *Findon v. Parker*, 11 Mees. & W. 682.

<sup>188</sup> See *Perine v. Dunn*, 3 Johns. Ch. (N. Y.) 508; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623; *Duke v. Harper*, 66 Mo. 51; *McCall v. Capehart*, 20 Ala. 521; *Com. v. Dupuy*, Brightly, N. P. (Pa.) 44.

<sup>189</sup> *Williams v. Fowle*, 132 Mass. 385; *Knight v. Sawin*, 6 Greenl. (Me.) 361; *Inhabitants of Industry v. Inhabitants of Starks*, 65 Me. 107; *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Commissioners v. Jameson*, 80 Ind. 154; *Cooley*

so interested,<sup>190</sup> or if he is a near relative of the litigant;<sup>191</sup> nor, it seems, for a person to assist one who has a good cause of action, and is too poor to sue.<sup>192</sup> He must assist, however, because of such interest or relationship.<sup>193</sup>

Champerty, or the maintenance of a suit for a share of the proceeds, has been repeatedly held to avoid an agreement made in contemplation of it. An example of champerty is where a person seeks out another who has a cause of action for the recovery of land or other property, and makes an agreement to institute and conduct a suit, and pay the costs, in consideration of receiving a share of whatever may be recovered. Such an agreement is clearly illegal.<sup>194</sup> A frequent instance of champerty is where an attorney agrees to conduct litigation, and pay the costs, in consideration of receiving a certain percentage of what he may recover. Most of the courts hold such an agreement illegal.<sup>195</sup>

v. Osborne, 50 Iowa, 526. Where several persons, for instance, have been induced on the same representations to buy stock, it is not maintenance for them to contribute to the expense of a suit by one of them to recover the money paid by him, as they all have a common interest in settling the question as to defendant's liability. *Davies v. Stowell*, 78 Wis. 334, 47 N. W. Rep. 370.

<sup>190</sup> *Lewis v. Brown*, 36 W. Va. 1, 14 S. E. Rep. 444; *Wellington v. Kelly*, 84 N. Y. 543; *Findon v. Parker*, 11 Mees. & W. 679.

<sup>191</sup> *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623; *Gilleland v. Failing*, 5 Denio (N. Y.) 308; *Morris v. Henderson*, 37 Miss. 492; *Walker v. Perryman*, 23 Ga. 309, at page 316. See *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. Rep. 272. But see *Barnes v. Strong*, 1 Jones, Eq. (N. C.) 100; *Hutley v. Hutley*, L. R. 8 Q. B. 112.

<sup>192</sup> *Dunne v. Herrick*, 37 Ill. App. 180.

<sup>193</sup> *Greenh. Pub. Pol.* p. 401.

<sup>194</sup> *Gilbert v. Holmes*, 64 Ill. 548; *Thompson v. Reynolds*, 73 Ill. 11; *Coleman v. Billings*, 89 Ill. 183; *Munday v. Whissenhunt*, 90 N. C. 458; *Slade v. Rhodes*, 2 Dev. & B. Eq. (N. C.) 24; *Banes v. Strong*, 1 Jones, Eq. (N. C.) 100; *Thompson v. Warren*, 8 B. Mon. (Ky.) 488; *Hayney v. Coyne*, 10 Heisk. (Tenn.) 339; *Jenkins v. Bradford*, 59 Ala. 400; *Martin v. Veeder*, 20 Wis. 466; *Barker v. Barker*, 14 Wis. 131; *Duke v. Harper*, 66 Mo. 51; *Stanley v. Jones*, 7 Bing. 369; *Sprye v. Porter*, 7 El. & Bl. 81.

<sup>195</sup> *Thompson v. Reynolds*, 73 Ill. 11; *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Coughlin v. Railroad Co.*, 71 N. Y. 443; *Lancy v. Havender*, 146 Mass. 615, 16 N. E. Rep. 464; *Thurston v. Percival*, 1 Pick. (Mass.) 415; *Boardman v. Thompson*, 25 Iowa, 487; *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. Rep.

A less obvious form of champerty is in the case of a purchase out and out of a right of action. The validity of such an agreement would depend on whether the purchase included any substantial interest beyond a mere right to litigate. If property is bought to which a right to sue attaches, that fact will not avoid the con-

730; *Evans v. Bell*, 6 Dana (Ky.) 479; *Park Com'rs v. Coleman*, 108 Ill. 591; *Million v. Ohnsorg*, 10 Mo. App. 432; *Scobey v. Ross*, 13 Ind. 117; *Lafferty v. Jelley*, 22 Ind. 471. In Massachusetts it is immaterial that the attorney does not agree to pay the expenses of the suit. *Lathrop v. Amherst Bank*, 9 Metc. (Mass.) 492; *Ackert v. Barker*, 131 Mass. 436. It has even been held that, where the attorney has received money under such an agreement for his client, the latter cannot maintain an action to recover it. *Best v. Strong*, 2 Wend. (N. Y.) 319. Contra, *Ackert v. Barker*, 131 Mass. 436; *Stearns v. Felker*, 28 Wis. 594. But "contracts which merely make the compensation of an attorney contingent upon success, even though an interest in the judgment expected be given, are not void." *Greenh. Pub. Pol. rule 334* (collecting the cases); *Phillips v. Commissioners*, 119 Ill. 626, 10 N. E. Rep. 230; *Wilhite v. Roberts*, 4 Dana (Ky.) 172; *Duke v. Harper*, 66 Mo. 51; *Allard v. Lamirande*, 29 Wis. 502; *Commissioners v. Coleman*, 108 Ill. 591; *Moses v. Bagley*, 55 Ga. 283; *Blaisdell v. Ahern*, 144 Mass. 393, 11 N. E. Rep. 681; *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. Rep. 441; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. Rep. 169; *Wright v. Tebbitts*, 91 U. S. 252; *Winslow v. Railroad Co.*, 71 Iowa, 197, 32 N. W. Rep. 330; *Lewis v. Brown*, 36 W. Va. 1, 14 S. E. Rep. 444; *Howard v. Carpenter*, 22 Md. 10, at page 26; *Cain v. Warford*, 33 Md. 23; *Manning v. Sprague*, 148 Mass. 18, 18 N. E. Rep. 673; *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. Rep. 730; *Dahms v. Sears*, 13 Or. 47, 11 Pac. Rep. 891; *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. Rep. 747. A contract to pay an attorney "ten per cent. on the amount that he may succeed in getting a decree reduced which has been rendered" is not champertous. *Nickels v. Kane*, 82 Va. 309. An agreement to pay an attorney so much for successfully defending an action, and, in case the action is abandoned, so much per diem for services already rendered, is not champertous. *Elliott v. Rubel*, 132 Ill. 9, 23 N. E. Rep. 400, reversing 30 Ill. App. 62. In Michigan the common law relating to champerty is virtually repealed by statute, and a contract between an attorney and his client that the attorney shall pay all costs incurred on account of bringing an action, in case he fails to recover anything, is valid. *Wilkey v. Crane*, 63 Mich. 720, 30 N. W. Rep. 327. In Illinois, where the doctrine as to champerty is recognized, it has been held that an agreement between a woman having a cause of action against a railroad company for injuries resulting from its negligence, and being without money to prosecute her action, and an attorney, that he shall advance all the costs, and for his compensation have half the recovery, is not void for champerty. *Dunne v. Herrick*, 37 Ill. App. 180.



tract, but an agreement to purchase a bare right to sue would not be sustained.<sup>196</sup> "As to the purchase of things in litigation in general, the authorities cannot all be reconciled in detail. But the distinction which runs through them all is to this effect. The question in every case is whether the real object be to acquire an interest in property for the purchaser, or merely to speculate in litigation on the account either of the vendor and purchaser jointly, or of the purchaser alone. It is not unlawful to purchase an interest in property, though adverse claims exist which make litigation necessary for realizing that interest, but it is unlawful to purchase an interest merely for the purpose of litigation; in other words, the sale of an interest to which a right to sue is incident is good, but the sale of a mere right to sue is bad."<sup>197</sup>

As we have stated above, it is not regarded as maintenance for a near relative to assist a person in litigation. This rule, however, does not apply to champerty. Not even a relative can assist for a share of the recovery. "Lineal kinship in the first degree, or apparent heirship, and to a certain extent, it seems, any degree of kindred or affinity, or the relation of master and servant, may justify acts which, as between strangers, would be maintenance; but blood relationship will not justify champerty."<sup>198</sup>

It should be noted that the defense of champerty or maintenance cannot be set up to defeat a recovery on the cause of action to

<sup>196</sup> *Prosser v. Edmonds*, 1 Younge & C. 499. For a good statement of the rules and exhaustive collection of the cases on this subject, see Greenh. Pub. Pol. pp. 409-441. And see *Norton v. Tuttle*, 60 Ill. 130; *Brush v. Sweet*, 38 Mich. 574; *Illinois Land & L. Co. v. Speyer*, 138 Ill. 137, 27 N. E. Rep. 931; *Dayton v. Fargo*, 45 Mich. 158, 7 N. W. Rep. 758; *Milwaukee & St. P. R. Co. v. Milwaukee & M. R. Co.*, 20 Wis. 174. Conveyance of land held adversely by another. *Greer v. Wintersmith*, 85 Ky. 516, 4 S. W. Rep. 232; *Smith v. Price* (Ky.) 7 S. W. Rep. 918; *Bentley v. Childers*, Id. 628; *Combs v. McQuinn* (Ky.) 9 S. W. Rep. 495; *Nelson v. Brush*, 22 Fla. 374; *Gamble v. Hamilton*, 81 Fla. 401, 12 South. Rep. 229; *Snyder v. Church*, 24 N. Y. Supp. 337, 70 Hun, 428; *Winstandley v. Stipp*, 132 Ind. 548, 32 N. E. Rep. 302; *Sands v. Church*, 70 Hun, 483, 24 N. Y. Supp. 251. Sale of personality in the adverse possession of a third person under claim of title. *Erickson v. Lyon*, 26 Ill. App. 17; *Foy v. Cochran*, 88 Ala. 353, 6 South. Rep. 685.

<sup>197</sup> Pol. Cont. 325.

<sup>198</sup> Pol. Cont. 330; *Hutley v. Hutley*, L. R. 8 Q. B. 112.

which the illegal agreement relates. It can only be set up against the enforcement of the illegal agreement itself.<sup>199</sup>

### **SAME—AGREEMENTS OF IMMORAL TENDENCY.**

**190. Any agreement which is contrary to established rules of decency and morality is contrary to public policy.**

Agreements which are contrary to established rules of decency and morality, or, as it is said, *contra bonos mores*, though the acts to which they tend may not be prohibited in the sense of rendering the doer liable to a penalty, are contrary to public policy, and will not be enforced. The aspect of immorality with which the courts are generally called upon to deal is sexual immorality. Unlawful sexual intercourse is not a crime at common law unless it is open and notorious, so as to constitute a public scandal and nuisance, but any unlawful sexual intercourse is *contra bonos mores*. A promise, therefore, given in consideration of present or future illicit cohabitation or intercourse, is void;<sup>200</sup> and it is immaterial, in such case, whether the contract is by parol or under seal, for, as we have seen, though no consideration at all is necessary to support a promise under seal, yet, if there is a consideration, its illegality will avoid the contract.

A promise made in consideration of past illicit cohabitation is not generally held to be made on an illegal consideration, but is a mere gratuitous promise, because the consideration is past, and is

<sup>199</sup> *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. Rep. 865; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623; *Boone v. Chiles*, 10 Pet. 177; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Robison v. Beall*, 26 Ga. 17; *Allison v. Railroad Co.*, 42 Iowa, 274; *Hilton v. Woods*, L. R. 4 Eq. 432; *Courtright v. Burnes*, 3 McCrary, 60, 13 Fed. Rep. 317; *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. Rep. 573; *Small v. Railroad Co.*, 55 Iowa, 583, 8 N. W. Rep. 437. *Contra*, *Barker v. Barker*, 14 Wis. 131; *Allard v. Lamirande*, 29 Wis. 502.

<sup>200</sup> *Ayerst v. Jenkins*, 16 Eq. 275; *Wallace v. Rappleye*, 103 Ill. 229; *Walker v. Perkins*, 3 Burrows, 1568; *Baldy v. Stratton*, 11 Pa. St. 316; *Massey v. Wallace*, 32 S. C. 149, 10 S. E. Rep. 937; *Drennan v. Douglas*, 102 Ill. 341; *Hanks v. Naglee*, 54 Cal. 51; *Forsythe v. State*, 6 Ohio, 20; *Walker v. Gregory*, 36 Ala. 180; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191; *Goodal v. Thurman*, 1 Head (Tenn.) 209; *Saxon v. Wood*, 4 Ind. App. 242, 30 N. E. Rep. 797.

not enforceable if made by parol, though it is binding if made under seal, no consideration at all being necessary in such a case.<sup>201</sup> It has been held that, if the past illicit cohabitation was accompanied by seduction, there is sufficient consideration to support a parol promise;<sup>202</sup> but this is contrary to the well-settled doctrine that a moral obligation is no consideration for a promise, and the weight of authority is the other way.<sup>203</sup>

An agreement, as we shall presently see more at length, may be innocent in itself, but may be intended to further an immoral purpose. If both of the parties have such an intention, the agreement is void. It has even been held in England that, if one of the parties knows of such an intention on the part of the other, the agreement is void. Applying this principle, it has been there held that a person cannot recover the hire of a conveyance let by him to a prostitute with the knowledge that she intended to use it for immoral purposes;<sup>204</sup> and even in this country it has been held that the owner of premises who knowingly lets them to be used as a bawdyhouse cannot recover the rent.<sup>205</sup> There is a conflict on this point which we will consider in treating of the effect of illegality.

### **SAME—GAMING AND WAGERING TRANSACTIONS.**

191. In many, if not in most, of the states, gaming transactions and wagers on matters in which the parties have no interest are considered contrary to public policy.

We have already fully considered this subject in treating of agreements in breach of statute, for the reason that in most, if not

<sup>201</sup> *Gray v. Mathias*, 5 Ves. 286; *Beaumont v. Reeve*, 8 Q. B. 483; *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. Rep. 1001; *Brown v. Kinsey*, 81 N. C. 245; *Massey v. Wallace*, 32 S. C. 149, 10 S. E. Rep. 937; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Wyant v. Leshar*, 23 Pa. St. 338. But see *Wallace v. Rappleye*, 103 Ill. 229, at page 249; *McDonald v. Fleming*, 12 B. Mon. (Ky.) 285.

<sup>202</sup> *Smith v. Richards*, 29 Conn. 232; *Shenk v. Mingle*, 13 Serg. & R. (Pa.) 23.

<sup>203</sup> Ante, pp. 180, 204.

<sup>204</sup> *Pearce v. Brooks*, L. R. 1 Exch. 213.

<sup>205</sup> *Dougherty v. Seymour*, 16 Colo. 289, 26 Pac. Rep. 823; *Ashbrook v. Dale*, 27 Mo. App. 649; *Ernst v. Crosby* (Sup.) 21 N. Y. Supp. 365; *Id.*, 140 N. Y. 864, 35 N. E. Rep. 603; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. Rep. 294.

all, the states, such agreements are expressly prohibited by statute. We have also shown that, while such agreements were enforceable in England, and in some of our states, until they were prohibited by statute, they have been held contrary to public policy in other states, and void whether prohibited by statute or not. It is only necessary to mention the subject here, and refer the reader to what we have already said in regard to it.<sup>206</sup>

### **SAME—AGREEMENTS TENDING TO FRAUD AND BREACH OF TRUST.**

**192. Any agreement which has a direct tendency to induce a person to commit a fraud upon the rights of others, or a breach of trust and confidence, is illegal as being contrary to public policy.**

"Contracts," it has been said, "which are opposed to open, upright, and fair dealings, are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. \* \* \* The law will not only avoid contracts, the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons."<sup>207</sup> Although

<sup>206</sup> Ante, p. 405.

<sup>207</sup> Greenb. Pub. Pol. 204; *Edwards v. Estell*, 48 Cal. 184; *Spinks v. Davis*, 32 Miss. 152; *Smith v. Townsend*, 109 Mass. 500; *Rice v. Wood*, 113 Mass. 133; *Holcomb v. Weaver*, 136 Mass. 265; *Byrd v. Hughes*, 84 Ill. 174; *McDonald v. Haughton*, 70 N. C. 393; *Forsyth v. Woods*, 11 Wall. 484; *Gleason v. Railroad Co. (Iowa)* 43 N. W. Rep. 517. A contract made by a person in contemplation of becoming an officer in a private corporation, and controlling a majority of its stock, that he will use his influence to retain another in office at a fixed salary, is void as against public policy, being inconsistent with the duty that the promisor, as an officer, owes to the stockholders, though no direct private gain is to result therefrom to him. *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. Rep. 838. For other instances of illegal contracts by officers of corporations, see *Wilbur v. Stoepel*, 82 Mich. 344, 46 N. W. Rep. 724; *Attaway v. Bank*, 93 Mo. 485, 5 S. W. Rep. 16; *Lum v. Clark (Minn.)* 57 N. W. Rep. 662; *Guernsey v. Cook*, 120 Mass. 501. It tends to a fraud on a corporation for its officers to purchase

the act contracted to be done "may be just and beneficial as between the parties immediately concerned in it, and though it be accomplished in good faith and without undue means, yet the contract to procure to be done is held to be against public policy, because its natural effect is to cause the party to abuse the confidence placed in him, \* \* \* and thereby prejudicially to affect the rights of others."<sup>208</sup> It is impossible to go further into the

claims against it, and a contract for such a purchase cannot be enforced. *McDonald v. Houghton*, 70 N. C. 393. A good illustration of such an agreement is where a broker employed to sell property is also employed by the person to whom he sells to buy, thus to receive a commission from both parties. *Rice v. Wood*, *supra*; *Everhart v. Searle*, 71 Pa. St. 256. And see *Holcomb v. Weaver*, *supra*. So, also, where a broker is employed to sell land, an agreement with a person who wishes to buy, by which the broker is to introduce him to the principal, and receive part of the land when purchased, is void. *Smith v. Townsend*, *supra*. An agreement between real-estate agents representing different principals to divide commissions in case they can effect a sale or exchange between their respective principals is void as against public policy. *Levy v. Spencer*, 18 Colo. 532, 33 Pac. Rep. 415. A contract by an advertising solicitor to sell to a "specialist" letters written by persons affected with diseases to another person who advertised articles and instruments that it was claimed would cure them, in order that such specialist might send his advertisements to them, is against public policy. "Thus to traffic in the letters of third parties, without their knowledge or consent, and to make them articles of merchandise in the manner attempted here, was, to mildly characterize it, grossly disreputable business." *Rice v. Williams*, 32 Fed. Rep. 437.

<sup>208</sup> *Spinks v. Davis*, *supra*; *Gleason v. Railroad Co.* (Iowa) 43 N. W. Rep. 517; *Levy v. Spencer*, 18 Colo. 532, 33 Pac. Rep. 415. As said in an English case: "I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another, by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal. It is intended by the party who promises the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt. It would plainly be in contravention of the maxim, 'E turpi causa non oritur actio,' and most mischievous, to hold that a man can come into court to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged. It is sufficient that the consideration upon which the promise was made was

various rules growing out of this principle. They have been admirably stated, and the illustrations and authorities collected, by Greenhood in his work on Public Policy.<sup>209</sup>

#### **SAME—AGREEMENTS IN DEROGATION OF THE MARRIAGE RELATION.**

**193.** As a general rule, any agreement which restrains the freedom of parties to marry, or the freedom of choice in marrying, or impairs the sanctity and security of the marriage relation, or is otherwise in derogation of such relation, is contrary to public policy.

Agreements which restrain the freedom of marriage are discouraged on political and social grounds, as injurious to the increase of population and the moral welfare of the citizen. Agreements not to marry are therefore void. A promise to marry no one but the promisee, for instance, on penalty of paying her a certain sum, has been held void because there was no promise of marriage on either side, and the agreement was purely restrictive.<sup>210</sup> So, also, a wager in which one man bet another that he would not marry within a certain time was held void, as giving to one of the parties a pecuniary interest in not marrying.<sup>211</sup>

Contracts restraining the freedom of choice in entering into a marriage, such as marriage brokerage contracts, or promises made

intended to be a corrupt one." *Harrington v. Dock Co.*, 3 Q. B. Div. 549. The rule does not apply to a case in which a broker is acting as agent of both parties with their knowledge. As said by Greenhood, "no contract for the payment for services is invalid because the promisee occupies another position, in conflict with such employment, when the antagonism is only towards the promisor himself, and he is fully cognizant of it." Rule 262; *Shaw v. Andrews*, 9 Cal. 73; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245; *Bonwell v. Howes* (City Ct. N. Y.) 1 N. Y. Supp. 435; *post*, p. 727.

<sup>209</sup> Greenh. Pub. Pol. pp. 292-326.

<sup>210</sup> *Lowe v. Peers*, 4 Burrows, 2225. See *Hogan v. Curtin*, 88 N. Y. 162.

<sup>211</sup> *Hartley v. Rice*, 10 East, 22. And see *Chalfant v. Payton*, 91 Ind. 202; *James v. Jellison*, 94 Ind. 292; *Sterling v. Sinnickson*, 5 N. J. Law, 756; *Bostick v. Blades*, 59 Md. 231. But see *Shafer v. Senseman*, 125 Pa. St. 310, 17 Atl. Rep. 350.

upon consideration of the procuring or bringing about of a marriage, are held illegal on social grounds.<sup>213</sup>

Agreements are also contrary to public policy if they directly tend to disturb or prejudice the status of a lawful marriage after it has been entered into. Agreements for separation of husband and wife are valid if made in prospect of an immediate separation; but if they provide for a possible separation in the future they are illegal, and it is immaterial whether they are made before or after marriage, because they give inducements to the parties not to perform "duties in the fulfillment of which society has an interest."<sup>213</sup> "The distinction rests on the following ground: An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still that state of things is abnormal, and not to be contemplated beforehand. 'It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.' Or, in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves."<sup>214</sup>

To obtain a divorce by collusion is not only an evasion of justice, but is contrary to public policy, as being in derogation of the marriage relation; and any agreement, therefore, between husband and

<sup>213</sup> *Arundel v. Trevillian*, Rep. Ch. 47; *Crawford v. Russell*, 62 Barb. 92; *Duval v. Wellman* (Com. Pl. N. Y.) 1 N. Y. Supp. 70; *Id.*, 124 N. Y. 156, 26 N. E. Rep. 343; *Johnson v. Hunt*, 81 Ky. 321.

<sup>214</sup> *Hunt v. Hunt*, 4 De Gex, F. & J. 221; *Westmeath v. Westmeath*, 1 Dow. & C. 519; *Cartwright v. Cartwright*, 3 De Gex, M. & G. 982; *Randall v. Randall*, 37 Mich. 563; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. Rep. 331; *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. Rep. 500; *Fox v. Davis*, 113 Mass. 255; *Adams v. Adams*, 25 Minn. 72; *Brown v. Brown*, 5 Gill (Md.) 249; *Appeal of Agnew* (Pa. Sup.) 12 Atl. Rep. 160; *Phillips v. Thorp*, 10 Or. 494; *Jenkins v. Hall* (Or.) 37 Pac. Rep. 62; *Walker v. Walker*, 9 Wall. 743; *Helms v. Franciscus*, 2 Bland (Md.) 544; *Barnes v. Barnes* (N. C.) 10 S. E. Rep. 304; *Wells v. Stout*, 9 Cal. 479; *Tallinger v. Mandeville*, 113 N. Y. 427, 21 N. E. Rep. 125; *Com. v. Richards*, 131 Pa. St. 209, 18 Atl. Rep. 1007; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. Rep. 324; *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. Rep. 1111; *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. Rep. 1114; *Carey v. Mackey*, 82 Me. 516, 20 Atl. Rep. 84.

<sup>214</sup> Pol. Cont. 286.

wife, in consideration of one of them withdrawing or not making opposition to a suit for divorce brought by the other, is void. This applies to any agreement intended to facilitate the procuring of a divorce.<sup>215</sup> It has been held in a late Massachusetts case that, where a wife has separated from her husband on grounds justifying a suit for divorce, an agreement, for a pecuniary consideration, to return and live with him, is contrary to public policy, but three of the judges dissented.<sup>216</sup>

It has also been held that contracts between husband and wife regulating their duties and conduct in matters pertaining directly and exclusively to the home cannot be made the subject of public inquiry, and that it is contrary to public policy to recognize and enforce them. The Iowa court, for instance, held illegal a contract between husband and wife whereby it was agreed to drop matters in dispute, to refrain from scolding, fault-finding, and anger, and live together as husband and wife; that the wife should keep her home in a comfortable condition; and that the husband should provide

<sup>215</sup> *Besant v. Wood*, 12 Ch. Div. 623; *Hamilton v. Hamilton*, 89 Ill. 349; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Muckenburg v. Holler*, 29 Ind. 139; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. Rep. 724; *Comstock v. Adams*, 23 Kan. 513; *Viser v. Bertrand*, 14 Ark. 266. An agreement between a man and his wife, made the day after he has been awarded a decree of divorce, whereby he agrees to pay her an annuity if she will not move for a new trial, is void as tending to facilitate divorce. *Blank v. Nohe*, 112 Mo. 159, 19 S. W. Rep. 65, and 20 S. W. Rep. 477. Contract by wife not to sue for alimony for a year is void. *Evans v. Evans* (Ky.) 20 S. W. Rep. 605. A promise to marry by a man who is already married would be void as an agreement to commit the crime of bigamy if a marriage were contemplated during the lifetime of his wife. Even if the promise is not to be performed until after the wife's death, the promise is clearly illegal as being immoral and in derogation of the marriage relation. If the promisee is ignorant of the fact that the promisor is already married, she may maintain an action against him for breach of his promise. See *Paddock v. Robinson*, 63 Ill. 99; *Haviland v. Halstead*, 34 N. Y. 643; *Cammerer v. Muller* (Sup.) 14 N. Y. Supp. 511; *Id.*, 133 N. Y. 623, 30 N. E. Rep. 1147; *Kerns v. Hagenbuchle* (Super. N. Y.) 17 N. Y. Supp. 367.

<sup>216</sup> *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. Rep. 271 (Holmes, Allen, and Knowlton, JJ., dissenting.) And see, contra, *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. Rep. 227.



all the necessary expenses of the family, and pay the wife, in addition, a certain sum per month.<sup>217</sup>

#### **SAME—AGREEMENTS IN RESTRAINT OF TRADE.**

194. Any agreement which unreasonably restrains a person from exercising his trade or business is contrary to public policy.

195. A restraint is not unreasonable if it is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.

196. It was formerly thought, and is still held in some jurisdictions, that though the restraint might be unlimited as to time, it could not be unlimited as to space; but modern decisions raise a doubt upon this question.

197. Within this class are combinations and agreements tending to prevent competition, enhance prices, and create monopolies, but they had best be treated separately.

A contract in unreasonable restraint of trade is contrary to public policy and void. "The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly.

<sup>217</sup> *Miller v. Miller*, 78 Iowa, 177, 35 N. W. Rep. 464, and 42 N. W. Rep. 641.

And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."<sup>218</sup> As has been stated, public policy requires that the freedom of persons to enter into contracts shall not be lightly interfered with. Some restraint of trade, therefore, must be permitted, but we shall see that it must not be unreasonable.

Restraint of trade may be (1) unlimited as to space, but limited as to time, as where a person binds himself not to carry on a trade anywhere for a certain time; or (2) it may be unlimited as to time, but limited as to space, as where he binds himself never to carry on a trade in a particular city; or, again, (3) it may be unlimited both as to time and space, as where he agrees never to carry on a trade any where. If the restraint is limited as to space, as in case 2, it is called a "partial restraint," while if unlimited as to space, whether limited as to time or not, as in cases 1 and 3, it is called a "general restraint."

At one time in England it was considered that a contract was contrary to public policy if it placed any restraint at all on a man's right to exercise his trade or calling. Gradually, however, exceptions were recognized, until at last the court, in a leading case, established the rule that a contract in restraint of trade, upon consideration which shows it was reasonable for the parties to enter into it, is good; "that wherever a sufficient consideration appears to make it a proper and useful contract,"<sup>219</sup> and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, but with this constant diversity, viz. where the restraint is general, not to exercise a trade throughout the kingdom, and

<sup>218</sup> *Alger v. Thacher*, 19 Pick. (Mass.) 51.

<sup>219</sup> It is well settled that a contract in restraint of trade must be based on a sufficient consideration. *Ante*, p. 162. See *Chapin v. Brown*, 83 Iowa, 156, 48 N. W. Rep. 1074. In this case the grocers in a certain town agreed with a firm which was about to open a butter store that they would not buy any butter for two years. The firm did not buy out any business, but merely opened a store. The court held the agreement was not based on a sufficient consideration. And see *Urmston v. Whitelegg*, 63 Law T. 455.

where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive."<sup>220</sup> Although in that case the restraint was limited both as to time and space, so that it did not call for a decision on a contract in general restraint of trade, it has since been assumed in numerous cases, and in many directly decided, that a contract which imposes a restraint which is unlimited as to space is void on its face.<sup>221</sup> In England the law is unsettled, and there is a difference of opinion among the judges. Some of them consider that under no circumstances can a restraint which is unlimited as to space be allowed, while others are inclined to allow such a restraint if, under the particular circumstances, it is reasonable.<sup>222</sup> The same diversity of opinion exists between the courts of this country.<sup>223</sup>

To understand the state of the law on the subject we must consider the extent and effect of this conflict at some length, but before doing so we must understand the test which determines whether contracts even in partial restraint of trade will be upheld. The test is in all cases the reasonableness of the restraint. This much is surely settled, subject only to the qualification, above mentioned, that some of the judges consider that a contract in general restraint of trade is unreasonable and void on its face, without regard to the particular circumstances; that the mere fact of universality renders it unreasonable, or at least void, without regard to whether or not it is reasonable.

In determining whether a particular restraint is reasonable, the court will consider the nature and extent of the trade or business, the situation of the parties, and all the other circumstances. If, on such a consideration, the restraint seems unreasonable, the contract will be declared void, however partial the restraint may be. The fact that the restraint is reasonably necessary to protect the party for whose benefit it is imposed is considered a strong reason for upholding the contract, while on the other hand, if it is not necessary, the contract will always be held void, for in such a case there can be no reason for oppressing the other party, and depriving the

<sup>220</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181.

<sup>221</sup> *Post*, p. 450.

<sup>222</sup> *Post*, p. 451.

<sup>223</sup> *Post*, p. 452.

public of the benefit of his carrying on his trade. As said in a leading case, the court will consider "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."<sup>224</sup>

To illustrate this rule, a retail merchant, a mechanic, or a professional man, whose trade or business does not extend beyond the limits of the city in which he does business, or the immediate neighborhood, may, on selling his business, bind himself not to engage in the same business in that city or neighborhood. This is clearly necessary to protect the interests of the other party.<sup>225</sup> On the other hand, it could only oppress him, and could not benefit the other party, to uphold a promise not to engage in the same business

<sup>224</sup> *Horner v. Graves*, 7 Bing. 735; *Rousillon v. Rousillon*, 14 Ch. Div. 358; *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. Rep. 712; *Kuler v. Taylor*, 53 Pa. St. 467; *Arnold v. Kreutzer*, 67 Iowa, 214, 25 N. W. Rep. 138; *Ellerman v. Stock Yards Co.*, 49 N. J. Eq. 217, 23 Atl. Rep. 287; *Wiley v. Baumgardner*, 97 Ind. 66; *Gill v. Ferris*, 82 Mo. 156. Injury to the interests of the public is always to be taken into consideration. See *Western Wooden-Ware Ass'n v. Starkey*, 84 Mich. 76, 47 N. W. Rep. 604.

<sup>225</sup> *Washburn v. Dosch*, 68 Wis. 436, 32 N. W. Rep. 551; *Dwight v. Hamilton*, 113 Mass. 175; *Finger v. Hahn*, 42 N. J. Eq. 606, 8 Atl. Rep. 654; *Linn v. Sigsbee*, 67 Ill. 75; *Hubbard v. Miller*, 27 Mich. 15; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. Rep. 634; *Smith v. Leady*, 47 Ill. App. 441; *McClurg's Appeal*, 58 Pa. St. 51; *Boutelle v. Smith*, 116 Mass. 111. An agreement by a person not to sell a particular line of goods in a certain town may be valid, *Clark v. Crosby*, 37 Vt. 188; or not to sell to anybody in a certain town or state except the promisee, *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. Rep. 333; *Roller v. Ott*, 14 Kan. 609; *Keith v. Optical Co.*, 48 Ark. 138, 2 S. W. Rep. 777. The following agreements have been held a reasonable restraint: Covenant in a deed not to sell intoxicating liquors on the premises in less quantities than five gallons, *Sutton v. Head*, 86 Ky. 156, 5 S. W. Rep. 410; or not to carry on a trading or mercantile business thereon, *Morris v. Manufacturing Co.*, 83 Ala. 565, 3 South. Rep. 689. Agreement by vendee of land not to sell sand from it. *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335. Not to manufacture ochre in a certain county. *Smith's Appeal*, 113 Pa. St. 579, 6 Atl. Rep. 251.

anywhere in the state, and such a promise would be void.<sup>226</sup> We can even imagine cases in which an agreement by a person, on selling his business, not to engage in the same business in the same city, would be unreasonable; as, for instance, in case of a small bakery in a large city, the trade of which is only in the vicinity of the shop. Again, a wholesale merchant selling only in a particular section of the country could not, on selling his business, bind himself not to engage in the same business anywhere in the United States, though the restriction would be valid if limited to the district covered by his trade, even though it might extend over several states.<sup>227</sup> The business of some wholesale houses extends over the entire United States, and even further; and the courts, as we shall see, show a tendency in some of the modern cases to allow a restriction coextensive with the business. Other courts, however, looking upon the restraint as general, hold it void on its face for that reason alone, without regard to what the interests of the other party may require. This diversity of opinion will now be considered.

*Restraint Unlimited as to Space.*

As we have already stated, it was for a long time thought, both in England and with us, that a contract in restraint of trade was void on its face if the restraint was unlimited as to space; that an agreement in general restraint of trade could under no circumstances be sustained; and there are modern cases laying down, or seeming to lay down, the same rule.<sup>228</sup> Such is stated by the

<sup>226</sup> *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. Rep. 712.

<sup>227</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419.

<sup>228</sup> *Alger v. Thacher*, 19 Pick. (Mass.) 51; *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. Rep. 299; *Dean v. Emerson*, 102 Mass. 480; *Curtz v. Gokey*, 68 N. Y. 300; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Thomas v. Miles*, 3 Ohio St. 274; *Long v. Towl*, 42 Mo. 545; *Peltz v. Elchele*, 62 Mo. 171; *Sutton v. Head*, 86 Ky. 156, 5 S. W. Rep. 410; *Smith's Appeal*, 113 Pa. St. 579, 6 Atl. Rep. 251; *Berlin Machine Works v. Perry*, 71 Wis. 495, 38 N. W. Rep. 82; *Wiley v. Baumgardner*, 97 Ind. 66; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64; *Warfield v. Booth*, 33 Md. 63; *Guerand v. Dandeleit*, 32 Md. 561; *Davis v. Barney*, 2 Gill & J. (Md.) 382; *Holmes v. Martin*, 10 Ga. 503; *Goodman v. Henderson*, 58 Ga. 567. It was at one time considered that an agreement not to carry on a business anywhere within a state, like an agreement not to carry it on anywhere within the United States, was unlimited as to space, and was invalid as imposing a general restraint, *Taylor v.*

Massachusetts court to be the settled law in that state, and it is said that, if any change is to be made in the law, it should be made by the legislature, and not by the courts.<sup>229</sup>

Many of the modern cases, on the other hand, show a strong tendency towards a relaxation of the old rule, and an unlimited restraint has been allowed where, under the particular circumstances, it was deemed reasonably necessary for the protection of the promisee. In a leading English case in the chancery division decided in 1880, a contract in restraint of trade limited as to time, but unlimited as to space, was upheld by Fry, J. He held that the mere fact that the restraint was unlimited as to space did not render it void; that the test of reasonableness must be applied in all cases, whether the restraint is general or only partial, and each case judged on its merits by the court.<sup>230</sup> In a later English case in the chancery division, court of appeal, the question was considered, but not decided. Cotton, L. J., was of opinion that the old rule against restraints unlimited as to space was a hard and fast rule, and rendered such a contract void on its face, without regard to the circumstances. Fry, L. J., adhered to his opinion in the former case, and Bowen, L. J., declined to express an opinion on the point.<sup>231</sup> In a still later English case in the chancery division, Chitty, J., after reviewing the previous decisions, said: "The result of the authorities down to the present time on this question of a covenant in restraint of trade appears to be as follows: Where the restraint is general,—that is, without qualification,—it is bad as being unreasonable and contrary to public policy; where it is partial,—that is, subject to some qualification either as to time or space,—then

Blanchard, 13 Allen (Mass.) 370; Chappel v. Brockway, 21 Wend. (N. Y.) 157; Wright v. Ryder, 36 Cal. 342; More v. Bonnet, 40 Cal. 251; Nobles v. Bates, 7 Cow. (N. Y.) 307; but this doctrine is now exploded. Such an agreement will now be enforced, even in those jurisdictions where a general restraint will not be allowed, if, under the circumstances, the restraint is reasonable. Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64; Beal v. Chase, 31 Mich. 490; Diamond Match Co. v. Roeber, 35 Hun (N. Y.) 421; Id., 106 N. Y. 473, 13 N. E. Rep. 419; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. Rep. 712.

<sup>229</sup> Gamewell Fire-Alarm Tel. Co. v. Crane (Mass.) 35 N. E. Rep. 98.

<sup>230</sup> Rousillon v. Rousillon (1880) 14 Ch. Div. 351.

<sup>231</sup> Davies v. Davies (1887) 36 Ch. Div. 359.

the question is whether it is reasonable, and, if reasonable, it is good in law. In considering the question of reasonableness, the points to which the attention of the court is specially directed are the limits of time and of space, and the protection required for the trade of the covenantee, this latter point involving the examination of the nature and extent of the trade. The reasonableness depends on all the circumstances, which must be duly weighed in each case. If the restraint is greater than can possibly be required for the protection of the business of the covenantee, the covenant is unreasonable and void. \* \* \* The circumstances which may be legitimately inquired into on this question of reasonableness appear to me to include the general circumstances under which the trade is carried on at the time when the covenant is entered into. The improvements in the means of communication which have taken place in recent times by reason of railways, steamships, postal facilities, the telegraph, and the telephone, are, I think, within the scope of the inquiry, and bear particularly on the question of space; they are relevant, more or less, in proportion to the greater or lesser area within which the trade sought to be protected is carried on, and to the varying nature of the trade itself. Such matters would have little or no relevancy if the question related to the protection of a small local business, such as that of a village baker or cobbler; and if the restraint sought to be imposed on a journeyman baker or cobbler, though limited as to time, extended to the whole of England, such a restraint would be unreasonable and vexatious. But they would be relevant in reference to the large trade of a merchant and a widely extended news-collecting agency, or to any other trade covering a great portion of the globe. What might in former ages have been considered an unreasonable restriction would not necessarily be so held in the altered circumstances of the present time."<sup>222</sup>

In this country, also, the courts of New York and some of the other states have shown a tendency to repudiate the old doctrine that the restraint can under no circumstances be unlimited as to space.<sup>223</sup> There is as yet no direct decision to this effect, for in

<sup>222</sup> *Badische, etc., v. Schott* [1892] 3 Ch. 447.

<sup>223</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419; *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. Rep. 712; *National Ben. Co. v. Hospital*

some of the cases the restraint was partial only, while in others, while it was general, it was considered unreasonable, as not necessary to protect the interests of the other party. What was said, therefore, as to the possibility of a general restraint being valid, was *obiter dictum*.

The result of the authorities on the validity of contracts in restraint of trade, in so far as the limitation as to space is concerned, may be summarized as follows: If the restraint is limited as to space it is valid, provided it is reasonable; that is, reasonably necessary for the protection of the interests of the party in whose favor it is imposed, and does not unduly interfere with the interests of the public. About this there is no doubt. If the restraint is unlimited as to space, or, what amounts to the same thing, if it extends over the whole United States, it is, in Massachusetts and some of the other states, held void on its face without regard to whether it may or may not be necessary to protect the interests of the party for whose benefit it is imposed. The mere fact that it is general renders it void. In England, and New York, Rhode Island, and other states the courts have shown a strong tendency to repudiate the old doctrine, and even deny that there has ever really been such a doctrine, and it is possible, if not probable, that, when called upon to decide the question, they will uphold a contract in unlimited restraint of trade, if, from the particular circumstances of the case, they can say that it is reasonably necessary as a protection to the party, and does not so interfere with the interests of the public as to render its enforcement contrary to public policy.

Whether or not there can be such a contract remains to be seen. If the universality of the restraint renders it unreasonable, then the contract is void; but is it not possible that the particular circumstances of a case may be such that the court can say that even a general restraint is reasonable? Such a case must needs be of rare occurrence, but is it not possible? If it is possible, it is better to wait until the case arises, and apply the test as in other cases,

Co., 45 Minn. 272, 47 N. W. Rep. 806; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 409, 9 Sup. Ct. Rep. 553; *Watertown Thermometer Co. v. Pool* (Sup.) 4 N. Y. Supp. 861; *Oakdale Manuf'g Co. v. Garst* (R. I.) 28 Atl. Rep. 973; *Carter v. Alling*, 43 Fed. Rep. 208. And see *Richards v. Desk & S. Co.* (Wis.) 58 N. W. Rep. 787.



than to lay down a hard and fast rule that no general restraint can be allowed. The doctrine as to restraint of trade is founded on public policy, and from the nature of things it must change. What was contrary to public policy a century ago is not necessarily so now, and what is contrary to public policy now may not be so a century hence. A century and a half ago it would have been deemed contrary to public policy to allow a wholesale dealer in Virginia, or in Massachusetts, to bind himself, on selling his business, not to engage in the same business in any of the colonies, since this could not have been necessary to protect the purchaser; but a wholesale tobacconist in Virginia who sells throughout the entire country could certainly bind himself now, on selling his business, not to engage in the business in any of the Atlantic states. If he could do this, why could he not bind himself not to engage in the business east of the Mississippi, or anywhere in the United States, for that matter, if his business extended so far? This would certainly be necessary to fully protect the purchaser of the business. It may be that such restraints as this, though necessary to protect the party, would unduly prejudice the rights of the public. If so, then it would be void as against public policy because of the injury to the public, not merely because the restraint is general. However the question may eventually be decided, it would seem better for the courts to remember that the doctrine as to restraint of trade is founded on public policy, and to apply that test, than to shut their eyes to it, and base their decisions solely on the ground that there is a hard and fast rule against a general restraint of trade.

*Restraint Unlimited as to Time.*

It has been said without qualification that, if the restraint is reasonably limited as to space, the fact that it is unlimited as to time will not render the agreement void; that, for instance, an agreement not to carry on a trade, business, or profession in a certain city is valid, though it may never be carried on there.<sup>284</sup> This statement is supported by a great many cases, but there is some strong reasoning, and at least one well-considered case, that throws a doubt

<sup>284</sup> *Bowser v. Bliss*, 7 Blackf. (Ind.) 344; *Duffy v. Shockey*, 11 Ind. 70; *Angier v. Webber*, 14 Allen (Mass.) 211; *Carll v. Snyder* (N. J. Ch.) 26 Atl. Rep. 977; *Cook v. Johnson*, 47 Conn. 178.

upon it. As we have seen, one of the tests as to the reasonableness of the restraint is whether it goes beyond what is necessary to afford a reasonable protection to the party for whose benefit it is imposed. If it does, the agreement is void, however limited the restraint is as to space. A restraint unlimited as to time may be necessary to protect the party in whose favor it is imposed, and in such a case it will be upheld; but, on the other hand, may it not be unnecessary? If it is, the agreement cannot be sustained.

In a leading English case the defendant had entered the service of the plaintiff, who was a druggist carrying on his business in the town of Taunton, as the plaintiff's assistant, under a contract whereby he agreed that he would not, at any time after leaving the plaintiff's service, engage in the business of a druggist and chemist in that town. The agreement was held void in the lower court, but the judgment was reversed on writ of error. "The agreement as to the time is indefinite," it was said by Lord Denman in the lower court. "It is not limited to such time as the plaintiff should carry on business in Taunton, nor to any given number of years, nor even to the life of the plaintiff; but it attaches to the defendant as long as he lives, although the plaintiff may have left Taunton, or parted with his business, or be dead. \* \* \* In the absence of any authority establishing the validity of an agreement thus indefinite in point of time, and trying the reasonableness of it by the test given in *Horner v. Graves*,<sup>235</sup> we think that the restraint is larger than the necessary protection of the party in favor of whom it is given requires, and that it is therefore unreasonable and oppressive."<sup>236</sup> This judgment was reversed on writ of error on the ground that a restriction so extensive in point of time was necessary for the protection of the promisee in the enjoyment of the good will of his trade. "The good will of a trade," it was said by Tindal, C. J., "is the subject of value and price. It may be sold, bequeathed, or become assets in the hand of the personal representative of a trader; and, if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such good will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable (as

<sup>235</sup> 7 Bing. 735; ante, p. 449.

<sup>236</sup> *Hitchcock v. Coker*, 6 Adol. & El. 438.

undoubtedly it is not) to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative."<sup>227</sup>

It will be observed that the legality of restrictions of this kind is put exclusively on the ground that they must be upheld as valid in order to prevent the destruction of a property, right, or interest called the "good will" of a trade or business. The reasoning, therefore, on which this decision is based, does not apply, it would seem, to its full extent at least, to contracts by which professional men, or possibly skilled mechanics, sell their practice or trade and good will, and agree not to engage in the practice or trade again. At any rate, this view was taken by the New Jersey court in a late case, in which it was held that, as the rule as to contracts in restraint of trade is that a contract imposing a restraint greater than is necessary to protect the party for whose benefit it is imposed is void, a covenant that a physician shall not "at any time thereafter" engage in practice in a certain city is void, because it would prevent him from practicing after the death of the other party.<sup>228</sup> The court in this case considered the English case above mentioned, and held that the reasoning did not apply. "The practice of a physician," it was said, "is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither an intrinsic nor a market value." The reasoning of the New Jersey court is strong, and is sufficient at least to throw a doubt on the rule, so often stated, that the fact that the restraint is unlimited as to time can make no difference. Exactly the contrary, however, has been held in Rhode Island. The reason of the English decisions mentioned above, it was said, "is as valid in the case of a profession as of a trade; for whether, technically speaking, there be any good will attending a profession or not, the professional

<sup>227</sup> *Hitchcock v. Coker*, 6 Adol. & E. 453. And see *Pemberton v. Vaughan*, 10 Q. B. 87; *Elves v. Crafts*, 10 C. B. 241; *Atkins v. Kinnier*, 4 Exch. (Welsb. H. & G.) 782; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344.

<sup>228</sup> *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. Rep. 37.

practice itself would probably sell for more with the restraining contract, if the restraint were unlimited in duration, than it would if the restraint were for the life of the promisee or covenantee only. If the complainant here wished to retire from his practice and sell it, he could probably sell it for more if he would secure the purchaser from competition forever than he could if he could only secure him from such competition during his own life. So, if he wished to take in a partner, he could for the same reason make better terms with him.”<sup>239</sup>

*Sale of Secret Process.*

A person engaged in manufacturing an article by a secret process may sell the business and secret, and make a valid promise not to divulge the secret to any one else, nor to engage himself at any time in manufacturing by that process. Such a restraint is necessary to protect the other party, and does not unduly prejudice the public. In speaking of such a contract, it was said by the New York court, in a late case, that it “simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what he paid for. It imposed no restriction upon either that was not beneficial to the other by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory.”<sup>240</sup>

<sup>239</sup> French v. Parker, 16 R. I. 219, 14 Atl. Rep. 870. To the same effect, see (the particular question does not seem to have been considered) Butler v. Burleson, 16 Vt. 176; Martin v. Murphy, 129 Ind. 464, 28 N. E. Rep. 1118; Linn v. Sigsbee, 67 Ill. 75; McClurg's Appeal, 58 Pa. St. 51; Miller v. Elliott, 1 Ind. 484; Cook v. Johnson, 47 Conn. 175; Doty v. Martin, 32 Mich. 412; Timmerman v. Dever, 52 Mich. 34, 17 N. W. Rep. 230. Agreement never to practice law in a particular town. Smalley v. Greene, 52 Iowa, 241, 3 N. W. Rep. 78; Bunn v. Guy, 4 East, 190.

<sup>240</sup> Tode v. Gross, 127 N. Y. 480, 28 N. E. Rep. 409 (affirming 4 N. Y. Supp. 402). And see Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. Rep. 658; Wiley v. Baumgardner, 97 Ind. 66; Vickery v. Welch, 19 Pick. (Mass.) 523; Peabody v. Norfolk, 98 Mass. 452; Jarvis v. Peck, 10 Paige (N. Y.) 118.

**SAME—UNLAWFUL COMBINATIONS—MONOPOLIES, TRUSTS,  
ETC.**

198. A combination between dealers in a necessary commodity to control and enhance the price by preventing competition in the sale thereof, or by decreasing the production, or by withholding it from the market, or other illegitimate means, is contrary to public policy.

199. Combinations to prevent competition have been allowed under particular circumstances.

200. In reason it would seem that combinations between laborers, mechanics, and other workmen to control the price of their labor should stand on the same footing as combinations between dealers, and there is authority for such a rule; but probably, by the weight of authority, such a combination is lawful if unlawful means for accomplishing the object are not contemplated, the mere fact of combination to control the price of labor not being per se illegal.

The law does not undertake to say to a dealer in a commodity, even though it may be one of the necessities of life, that he shall not sell it above a certain price, nor to compel him to sell it at all. Singly, he may suspend sales and raise the price to suit his own interests, though it may be detrimental to the public interest. The law does, however, condemn a combination between several manufacturers or dealers in a necessary commodity, the object of which is to control and enhance the price by preventing competition in the sale thereof, or by decreasing the production, or by withholding it from the market, or other illegitimate means. "When competition is left free," it was said by the Pennsylvania court, in holding a combination between coal companies void, "individual error or folly will generally find a correction in the conduct of others. But here the companies have combined together to govern the supply and the price of coal. \* \* \* This combination has a power in its confederated forms which no individual can confer. The public interest

must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise; or, if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply, or a rise in the price, of an article of such prime necessity, cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense."<sup>241</sup> Such agreements as these tend to create monopolies and stifle competition. They are not only contrary to statutes which have been enacted in most jurisdictions, but are contrary to public policy, and void independently of any statutory prohibition.

Some combinations between dealers are legitimate, and have been sustained, though the object was, to a certain extent, to prevent competition and enhance prices. The line between combinations that are lawful and those that are unlawful is not clear, and the cases are not uniform. It has been held that an agreement between partners not to sell below a certain price is not unlawful where there is no intention to create a monopoly and control prices.<sup>242</sup> "And combinations," says Greenwood, "among men engaged in business which has become ruinous, to raise prices to a

<sup>241</sup> Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Craft v. McConoughy, 79 Ill. 346; Central Salt Co. v. Guthrie, 35 Ohio St. 606; Arnot v. Coal Co., 68 N. Y. 558; Emery v. Candle Co., 47 Ohio St. 320, 24 N. E. Rep. 660; Richardson v. Buhl, 77 Mich. 632, 43 N. W. Rep. 1102; People v. Refining Co. (Cir. Ct.) 3 N. Y. Supp. 401, (Sup.) 7 N. Y. Supp. 406; Id., 121 N. Y. 582, 24 N. E. Rep. 834; Urmston v. Whitelegg, 63 Law T. 455; De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co. (Com. Pl. N. Y.) 14 N. Y. Supp. 277; Judd v. Harrington (Com. Pl. N. Y.) 19 N. Y. Supp. 406; Id., 139 N. Y. 105, 34 N. E. Rep. 700; Strait v. Harrow Co. (Sup.) 18 N. Y. Supp. 224; Nester v. Brewing Co., 161 Pa. St. 473, 29 Atl. Rep. 102; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. Rep. 279; Santa Clara, etc., Co. v. Hayes, 76 Cal. 387, 18 Pac. Rep. 391; Samuels v. Oliver, 130 Ill. 73, 22 N. E. Rep. 499; Leonard v. Poole, 114 N. Y. 371, 21 N. E. Rep. 707.

<sup>242</sup> Marsh v. Russell, 66 N. Y. 288.

reasonable point, especially when their operation is limited in every essential particular, are valid.”<sup>248</sup>

The rule that combinations to prevent competition and enhance prices are illegal does not apply, it seems, to a combination between manufacturers of an article which is not a necessity, where the agreement puts no restraint on the production and sale of the article. In a late Massachusetts case several rival manufacturers and sellers of a certain fixture, under patents owned by them, who were the principal dealers in the article, and substantially supplied the market with it, entered into a combination to prevent competition between them, and it was upheld. “Does the contract,” it was said, “impose a restraint as to the manufacture or the sale of balance shade rollers which is void as against public policy? The contract certainly puts no restraint upon the production of the commodity to which it relates. It puts no obligation upon, and offers no inducement to, any person to produce less than to the full extent of his capacity. On the contrary, its apparent purpose is, by making prices more uniform and regular, to stimulate and increase production. The contract does not restrict the sale of the commodity. It does not look towards withholding a supply from the market in order to enhance the price. \* \* \* On the contrary, the contract intends that the parties shall make sales, and gives them full power to do so; the only restrictions being that sales not at retail or for export shall be in the name of the plaintiff, and reported to it, and the accounts of them kept by it, and the provision that, when any party shall establish an agency in any city or town for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place. To these restrictions, clearly valid, is added the one which affords an argument for the invalidity of the contract,—the restriction as to price. That restriction is, in substance, that the prices for rollers of the same grade made by the different parties shall be the same, and shall be according to a schedule contained in the contract, subject to changes which may be made by the plaintiff upon recommendation of three-fourths of its stockholders. In effect, it is an agreement, between

<sup>248</sup> Greenh. Pub. Pol. rule 543; *Skrainka v. Scharringhausen*, 8 Mo. App. 522.

three makers of a commodity, that for three years they will sell it at a uniform price fixed at the outset, and to be changed only by consent of a majority of them. The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture. It does not look to affecting competition from outside (the parties have a monopoly by their patents), but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts, and to put a price on the products of their own industry. But we cannot assume that the purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price, and to prevent the injurious effects, both to producers and customers, of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid, as in restraint of trade or against public policy."<sup>244</sup>

*"Corners" in the Market.*

There are few combinations more clearly contrary to public policy than agreements to create what are known as "corners" in the market, as where several persons enter into a combination to buy up more of a commodity than there is in the market, so as to force a fictitious and unnatural rise in values, with a view of taking advantage of dealers and purchasers whose necessities compel them to

<sup>244</sup> *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. Rep. 629. And see *Dolph v. Laundry Co.*, 28 Fed. Rep. 553. And it has lately been held that a contract by which three of four companies engaged in the manufacture of oleomargarine consolidate as a corporation, for the purpose of stopping the sharp competition between them, and agree that none of them shall separately engage in the business for five years, is not invalid as creating a monopoly. *Oakdale Manuf'g Co. v. Garst* (R. I.) 28 Atl. Rep. 973.



buy.<sup>245</sup> Where the article is a necessary commodity, such as corn or wheat, the injury from such a transaction is far-reaching. It affects not only the large dealers who may be obliged to purchase, but affects all persons who have to use the commodity. A combination to create a corner in one of the necessities of life is not only illegal, but is criminal. A combination to acquire a controlling interest in the stock of a corporation for the purpose of creating a corner in the stock market, though probably not criminal, is at least illegal.<sup>246</sup>

*Monopolies under Patents.*

The rule against contracts in restraint of trade and monopolies does not apply, it seems, to contracts in reference to the production and sale of a patented article. It is the purpose of a patent to give the inventor a monopoly. It is a monopoly authorized by the government. In upholding an agreement by a patentee to allow an association and its members the exclusive use and sale of inventions patented by him, it was said: "It is true the members of the association do not agree to themselves use this machinery at all; nor do they agree as to any special amount of twine or rope which shall by each or all of them be offered for sale; and the practical result is to take the machinery out of use, unless these members themselves use or permit others to use it. This is a peculiarity of a patented article. The owner does not possess his patent upon the condition that he shall make or vend the article patented, or allow others to do so for a fair and reasonable compensation. When he has once secured his patent, he may, if he choose, remain absolutely quiet, and not only neglect and refuse to make the patented article, but he may likewise refuse to permit any one else to do so on any terms. If the patent be a valuable one, self-interest may be relied upon as a strong enough motive to induce the owner either to take himself, or to permit others to take, some steps towards introducing his invention into use. How far it will go depends upon the owner; and his right to decide that question is not in the least

<sup>245</sup> *Wright v. Crabbs*, 78 Ind. 487; *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. Rep. 525; *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. Rep. 499.

<sup>246</sup> *Sampson v. Shaw*, 101 Mass. 145.

circumscribed by the interests of the public in obtaining such machinery or invention, or a right to its use. He may keep such right himself, or make the machinery or manufacture the patented article alone, or he may permit others to share such right with him, or he may allow them an exclusive right, and retain none himself. It all follows and is founded upon the absolute and exclusive right which the owner of the patent has in the article patented. Having such right, he must plainly be permitted to sell to another the right itself, or to agree with him that he will permit none other than such person to use it. That person need not agree to make the patented article, or to sell it. It is a question solely for the parties interested. This right is necessary in order that the owner of the patent shall have the largest measure of protection under it. Considerations which might obtain if the agreement were in regard to other articles cannot be of any weight in the decision of the questions arising upon an agreement as to patented articles. If an owner of a patent should choose to refuse to manufacture the article covered by his patent, could any one else claim such right? His simple neglect or refusal to manufacture would stand as a conclusive reason why it was not manufactured. An owner might sometimes make more money by not manufacturing than by doing so; but of that question he is the sole and absolute judge."<sup>247</sup>

*Combinations between Laborers, Mechanics, and Other Workmen.*

If dealers cannot combine to stifle competition and control the price of a commodity, it would seem reasonable to suppose that workmen cannot combine to control the price of their labor. Labor is a commodity, and a very necessary commodity, and it would seem to be very unreasonable to allow laborers, mechanics, and other workmen to combine, and by stifling all competition between them force employers to pay any rate of wages they may demand, and at the same time to condemn as illegal a similar combination between dealers in a commodity for exactly the same purpose. In reason the two cases should be governed by the same principle, and

<sup>247</sup> *Good v. Daland*, 121 N. Y. 1, 24 N. E. Rep. 15. And see *Morse Co. v. Morse*, 103 Mass. 73; *Bowling v. Taylor*, 40 Fed. Rep. 404; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. Rep. 1005; *Printing & Numerical Reg. Co. v. Sampson*, L. R. 19 Eq. 462; ante, p. 460. But see *Strait v. Harrow Co.* (Sup.) 18 N. Y. Supp. 224.

both combinations should be declared illegal. Authority for declaring that the same principle does apply is not wanting. A short time ago a large number of the law stenographers of Chicago formed an association, and fixed a schedule of prices which should be binding on them; but the court held that it was contrary to public policy and illegal, citing, in support of the judgment, cases in which dealers in commodities and proprietors of boats had combined for a similar purpose. "Counsel seek to distinguish this case from those cited," it was said, "by the circumstance alleged in the second count of the declaration,—that but a small portion of the law stenographers of Chicago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of trade which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into, by a vendor of a business and its good will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists, the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection." 248

248 *More v. Bennett*, 140 Ill. 69, 29 N. E. Rep. 888.

In a leading English case<sup>340</sup> the action was based on a contract between four firms carrying on the business of stevedores in a certain port for regulating and distributing among them the stevedoring of ships at that port. The ships that might be consigned to a certain merchant doing business at the port were assigned to one of the parties, the ships consigned to another merchant to another of the parties, and so on. The second clause of the contract provided that if any of the merchants should refuse to allow the stevedoring of a ship consigned to him to be done by the party entitled to it under the contract, but should require one of the other parties to do it, then the party so required should give an equivalent to the party so entitled to it. The contract thus far was held valid, as it only afforded a fair protection to the parties, and did not prevent the merchants from employing any of the parties they might see fit to employ. The third clause of the contract, on the other hand, provided that, of ships not consigned to any of the merchants named, the first to arrive after the date of the contract should be stevedored by one of the parties, the second by another, the third by another, and so on. This clause was held invalid. Its effect, it was said, "is that as to such ships, if the merchants should not choose to employ the party to the agreement who, as between themselves, was entitled to do the stevedoring, all the parties to the agreement are deprived of the work. \* \* \* The covenant in such cases restrains three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, while the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of employing any of these parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well founded their objections may be to employ him. Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legitimate interests of the parties re-

<sup>340</sup> *Collins v. Locke*, 4 App. Cas. 674. And see *Ladd v. Manuf'g Co.*, 53 Tex. 172.

quired, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed."

On the other hand, combinations between laborers, mechanics, or other workmen have been held valid by most of the courts, even though the object was to prevent competition. Greenhood<sup>250</sup> lays down the rule (no doubt established by the weight of authority) that "combinations of artisans for their common benefit, as for the development of skill in their trade, or to prevent overcrowding therein,<sup>251</sup> or to encourage those belonging to their trade to enter their fold,<sup>252</sup> or for the purpose of raising the prices of labor,<sup>253</sup> are valid, provided no force or other unlawful means be employed to carry out their ends,<sup>254</sup> or their object be not to impoverish third persons,<sup>255</sup> or to extort money from employers,<sup>256</sup> or to encourage strikes or breaches of contract,<sup>257</sup> or to restrict the freedom of members for the purpose of compelling employers to conform to their rules."<sup>258</sup> And in his text he says: "Every one is perfectly free to bring his capital into the market on such terms as he may deem best, and, on the other hand, every one has the right to bring his labor into the market with the like want of restriction. It would seem that, if one can determine to withhold his labor from the market until

<sup>250</sup> Greenh. Pub. Pol. rule 546.

<sup>251</sup> Snow v. Wheeler, 113 Mass. 179.

<sup>252</sup> Com. v. Hunt, 4 Metc. (Mass.) 111. In this case a rule of an association forbade its members to work for any one who should employ nonunion members, and yet the combination was held not illegal. This, however, was a criminal prosecution, and this fact may be important. Many acts and objects render a contract illegal as being contrary to public policy which would not render the parties liable to a criminal prosecution. See Greenh. Pub. Pol. 648, note 2.

<sup>253</sup> Master Stevedore's Ass'n v. Walsh, 2 Daly (N. Y.) 1. But see People v. Fisher, 14 Wend. (N. Y.) 9.

<sup>254</sup> Reg. v. Rowlands, 17 Adol. & E. 671; Carew v. Rutherford, 106 Mass. 1; State v. Stewart, 59 Vt. 273, 9 Atl. Rep. 559; State v. Glidden, 55 Conn. 46, 8 Atl. Rep. 890; Old Dominion S. S. Co. v. McKenna, 30 Fed. Rep. 48.

<sup>255</sup> People v. Fisher, 14 Wend. (N. Y.) 9; Rigby v. Connol, 14 Ch. Div. 482; Hornby v. Close, L. R. 2 Q. B. 153.

<sup>256</sup> Carew v. Rutherford, 106 Mass. 1.

<sup>257</sup> Hornby v. Close, L. R. 2 Q. B. 153; Farrer v. Close, L. R. 4 Q. B. 602; Old Dominion S. S. Co. v. McKenna, 30 Fed. Rep. 48.

<sup>258</sup> Collins v. Locke, 4 App. Cas. 674.

his demands are complied with, several may meet and combine, and form the same resolution. If they cannot get work at their prices, they must be out of work; and in the same manner, if masters meet, and determine not to pay more than a certain amount of wages, they may be content to do without operatives, and suspend operations. The law is clear that workmen have a right to combine for their own protection, for the advancement of their own interests, and for the promotion of skill in their own trade, and for the obtainment of such wages as they may choose to agree to demand, when the purpose of the combination is to obtain a benefit which by law they can claim." 280

This argument does not seem altogether reasonable. The fact that one laborer may determine to withhold his labor from the market until his demands are complied with is not per se any reason why several may combine and form the same resolution. It is this combination to stifle competition and produce unnatural results that the law condemns as against public policy. There is just as much reason for saying that, if one dealer can determine to withhold his commodity from the market until his demands are complied with, several dealers can combine and form the same resolution. As we have seen, however, such a combination is illegal. The test in all of these cases should be whether public policy forbids the combination. If it does not, then the courts have no right to restrict the freedom of contract. If it does, then the interests of the individual must give way to the interests of the general public, and the courts should not hesitate to pronounce the combination illegal. It must be remembered that an act or object may render a contract illegal as being contrary to public policy where it would not render the parties liable to a criminal prosecution. It is not necessary for the court, before it can declare a combination between laborers contrary to public policy, to hold that they are guilty of a criminal conspiracy.

While, as we have seen, there is confusion and conflict on this point, and the weight of authority is with the rule stated by Greenhood, the cases mentioned in the first part of this paragraph seem to hold the better doctrine.

*Combinations between Employers.*

Where workmen are allowed to combine, it is only reasonable and just that the same right should be given employers. A contract, therefore, between employers for the purpose of protecting their interests against combinations of workmen, by which they agree to conduct their works, or wholly or partially to suspend them for a time, as the majority may resolve, has been held valid, and the mutual restraint of trade thereby imposed not unreasonable.<sup>200</sup>

**SAME—EXEMPTING FROM LIABILITY FOR NEGLIGENCE.**

201. A stipulation, in a contract between master and servant, that the master shall not be liable for injuries to the servant caused by the negligence of the master, or by the negligence of superior servants for which the law makes the master liable, is contrary to public policy.

202. The same is true of a stipulation in a contract with a common carrier, either of goods or passengers, exempting it from liability for losses or injuries caused by its negligence.

203. The same is true, in some jurisdictions, of a stipulation by a telegraph company exempting it from liability for error, delay, or nondelivery; but as to this there is a direct conflict of opinion.

According to the better opinion, a master cannot, by stipulation in the contract with his servant, exempt himself from liability for injuries to the servant caused by his negligence. Such a stipulation is void as being contrary to public policy.<sup>201</sup> It has also been held that, since the liability imposed upon a railroad company by law for injuries to their servants caused by the carelessness of those who are superior in authority and control over them is based upon

<sup>200</sup> *Hilton v. Eckersley*, 6 El. & Bl. 47.

<sup>201</sup> *Runt v. Herring*, 2 Misc. Rep. 105, 21 N. Y. Supp. 244, and cases there cited; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 South. Rep. 360; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 South. Rep. 276. See *Purdy v. Railroad Co.*, 125 N. Y. 209, 26 N. E. Rep. 255.

considerations of public policy, for this reason a railroad company cannot stipulate with its employes, at the time and as a part of their contract of employment, that such liability shall not attach to it. "Such liability is not created for the protection of the employes simply, but has its reason and foundation in a public necessity and policy, which should not be asked to yield or surrender to mere private interests and agreements."<sup>322</sup>

A railroad company, shipowner, or other common carrier cannot, by stipulation in contracts of carriage, exempt itself from liability, or limit its liability, for injury to passengers or goods caused by its own negligence or the negligence of its servants. Such a stipulation is, in this country at least, regarded as contrary to public policy.<sup>323</sup> It may, however, exempt itself from losses or injuries occurring from other causes than its own negligence, as from accident, and for which it would be liable as an insurer.<sup>324</sup>

<sup>322</sup> *Lake Shore Ry. Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. Rep. 467; *Johnson v. Railroad Co.*, 86 Va. 975, 11 S. E. Rep. 829; *Hissong v. Railroad Co.*, 91 Ala. 514, 8 South. Rep. 776. Contra, *Western R. Co. v. Bishop*, 50 Ga. 405 (holding such a contract valid so far as it does not waive any criminal neglect of the company or its principal officers; but this case expressly declares that contracts contravening public policy will not be enforced).

<sup>323</sup> *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357; *Armstrong v. Express Co.*, 159 Pa. St. 640, 28 Atl. Rep. 448; *Abrams v. Railway Co. (Wis.)* 58 N. W. Rep. 780; *Schulze-Berge v. The Guildhall*, 58 Fed. Rep. 796; *Monroe v. The Iowa*, 50 Fed. Rep. 561; *Johnson v. Railway Co. (Miss.)* 11 South. Rep. 104; *Louisville R. Co. v. Grant (Ala.)* 13 South. Rep. 599; *Gulf R. Co. v. Eddins (Tex. Civ. App.)* 26 S. W. Rep. 161; *Louisville R. Co. v. Dies*, 91 Tenn. 177, 18 S. W. Rep. 266; *Union P. Ry. Co. v. Rainey (Colo.)* 34 Pac. Rep. 986; *The Hugo*, 57 Fed. Rep. 403; *Atchison R. Co. v. Lawler (Neb.)* 58 N. W. Rep. 968; *St. Joseph R. Co. v. Palmer (Neb.)* 56 N. W. Rep. 957.

<sup>324</sup> *Indianapolis R. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. Rep. 1138; *Davis v. Railroad Co. (Vt.)* 29 Atl. Rep. 313. It may limit its liability to injuries received on its own line, *Texas & P. Ry. Co. v. Smith (Tex. Civ. App.)* 24 S. W. Rep. 565; *Galveston R. Co. v. Short (Tex. Civ. App.)* 25 S. W. Rep. 142; *McCann v. Eddy (Mo. Sup.)* 27 S. W. Rep. 541; *McEacheran v. Railroad Co. (Mich.)* 59 N. W. Rep. 612; *Coles v. Railroad Co.*, 41 Ill. App. 607; *Dunbar v. Railway Co.*, 36 S. C. 110, 15 S. E. Rep. 357; but not when it is a partner with the connecting line, *Gulf R. Co. v. Willbanks (Tex. Civ. App.)* 27 S. W. Rep. 302. It may exempt itself from liability after unloading, where it provides a covered warehouse into which the cargo is discharged, and the time and place of discharge are easily ascertainable by the consignees. *Constable v. Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. Rep. 1002.



As to the validity of stipulations in contracts with telegraph companies for the transmission of messages, there is a direct conflict of opinion. There are many cases which hold that a stipulation providing that the liability of the company for any mistake or delay in the transmission and delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and not against public policy, except in so far as it would exempt the company from liability for willful misconduct or gross negligence.<sup>265</sup> Another class of cases hold that there can be no consideration for such a stipulation on the part of the sender of the message, and, furthermore, that it is contrary to public policy.<sup>266</sup> Still another class of cases, while upholding such a stipulation in part, hold that it cannot exonerate the company from liability for damages caused by defective instruments, or a want of skill or ordinary care on the part of its operators.<sup>267</sup>

### EFFECT OF ILLEGALITY.

We come now to the second branch of the subject of illegality in contract,—its effect upon the validity of a contract. The effect of illegality upon the validity of contracts in which it appears varies according to the circumstances. It may affect the whole, or only a part, of a contract, and the legal and illegal parts may or not be

<sup>265</sup> *Riley v. W. U. Tel. Co.* (City Ct. N. Y.) 26 N. Y. Supp. 532; *Primrose v. W. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. Rep. 1098; *Hart v. W. U. Tel. Co.*, 63 Cal. 579, 6 Pac. Rep. 637; *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299; *W. U. Tel. Co. v. Carew*, 15 Mich. 525; *Camp v. W. U. Tel. Co.*, 1 Metc. (Ky.) 164; *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Passmore v. W. U. Tel. Co.*, 78 Pa. St. 238; *W. U. Tel. Co. v. Blanchard*, 68 Ga. 299 (45 Am. Rep. 486, note, collecting cases).

<sup>266</sup> *Brown v. Cable Co.*, 111 N. C. 187, 16 S. E. Rep. 179; *Tyler v. W. U. Tel. Co.*, 60 Ill. 421, 74 Ill. 168; *Wertz v. W. U. Tel. Co.* (Utah) 33 Pac. Rep. 136; *W. U. Tel. Co. v. Linn* (Tex. Sup.) 26 S. W. Rep. 490; *W. U. Tel. Co. v. Cook*, 61 Fed. Rep. 624; *Candee v. W. U. Tel. Co.*, 34 Wis. 477; *Bartlett v. Same*, 62 Me. 218.

<sup>267</sup> *Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433.

capable of separation. The direct object of a contract may be the doing of an illegal act, or the direct object may be innocent, though the contract is designed to further an illegal purpose. The parties may both be ignorant, or both be aware, of the illegality which remotely or directly affects the transaction; or one may be innocent of the objects intended by the other. Securities may be given for money due upon, or money advanced for, an illegal transaction, and the validity of such securities depends upon various considerations. Finally, though the contract is illegal, certain considerations may require that some relief be granted to one of the parties, notwithstanding his fault. This is a very complex and difficult branch of the law, and on some of the questions suggested there is a conflict of opinion. All we can do is to state the general principles which govern, and call attention to those points on which there is a conflict.

#### **SAME—AGREEMENTS PARTLY ILLEGAL.**

**204.** Where an agreement is illegal in part only, the part which is good may be enforced, provided it can be separated from the part which is bad, but not otherwise. In detail:

- (a) An indivisible promise to do several acts, some of which are illegal, or a single promise to do a legal act, based on several considerations, one of which is illegal, is wholly void.
- (b) But where distinct promises, some of which are good, are based on a good consideration, or where there are distinct promises based on several distinct considerations, some of which are good, the good promises, or promises based on good considerations, may be enforced.

An agreement may consist of a single promise based on a single consideration. If either the promise or the consideration is illegal, there is no difficulty in pronouncing the agreement void. On the other hand, there may be several promises or considerations, some of which only are illegal, and in these cases the agreement may or

may not be wholly void, according to the circumstances. Whether it is wholly void or not will depend upon whether it is one entire and indivisible agreement, or whether it is divisible, so that the good may be separated from the bad. "If any part of an agreement is valid, it will avail pro tanto, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant."<sup>268</sup> "If the part which is good depends upon that which is bad, the whole is void; and so I take the rule to be if any part of the consideration be malum in se, or the good and void consideration be so mixed, or the contract so entire, that there can be no apportionment."<sup>269</sup>

At one time a distinction was made in the application of this principle between illegality by reason of a statute and illegality at common law. The judges, fearing that statutes might be eluded, laid it down that "the statute is like a tyrant,—where he comes he makes all void; but the common law is like a nursing father,—makes only void that part where the fault is, and preserves the rest." Such a distinction, however, is no longer recognized.<sup>270</sup>

The above are the general rules, but it will aid us in understanding the doctrine if we state the law more in detail.

*Same—Indivisible Agreements.*

If a promise to do several acts is indivisible, and is in part illegal, it cannot be enforced as to that part which is legal, but the whole agreement is void.<sup>271</sup> This rule is too clear to need explanation.

<sup>268</sup> *Rand v. Mather*, 11 Cush. (Mass.) 1, overruling *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Bixby v. Moor*, 51 N. H. 402.

<sup>269</sup> 2 Kent, Comm. 407; *U. S. v. Bradley*, 10 Pet. 343; *Handy v. Publishing Co.*, 41 Minn. 188, 42 N. W. Rep. 872; *Santa Clara Co. v. Hayea*, 76 Cal. 387, 18 Pac. Rep. 391.

<sup>270</sup> *Anson*, Cont. 189; *State v. Findley*, 10 Ohio, 51; *Rand v. Mather*, 11 Cush. (Mass.) 1; *U. S. v. Bradley*, 10 Pet. 343; *Hynds v. Hays*, 25 Ind. 31. "Where you cannot sever the illegal from the legal part of the covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." *Pickering v. Railway Co.*, L. R. 3 C. P. 250.

<sup>271</sup> *Crawford v. Morrell*, 8 Johns. (N. Y.) 195; *Thayer v. Rock*, 13 Wend. (N. Y.) 53; *Leavitt v. Palmer*, 3 N. Y. 19.

The only difficulty is in determining whether the promise is divisible; but this is a question of interpretation of contracts.

Where the agreement consists of one promise made upon several considerations, some of which are bad and some good, here, also, the promise is wholly void, for it is impossible to say whether the legal or the illegal portion of the consideration most affected the mind of the promisor, and induced his promise.<sup>272</sup> An illustration of this rule is in the case of sales of goods, some of which it is illegal to sell. Where each article is sold for a separate price, the price of those articles which it was lawful to sell may be recovered.<sup>273</sup> If, however, a note is given for the price of all the articles, there can be no recovery at all on it, for it is based in part on an illegal consideration.<sup>274</sup>

<sup>272</sup> *Featherston v. Hutchinson*, Cro. Eliz. 199; *Trist v. Child*, 21 Wall. 441; *Ohio v. Board*, 35 Ohio St., at page 519; *Bixby v. Moor*, 51 N. H. 402; *Wisner v. Bardwell*, 38 Mich. 278; *Snyder v. Willey*, 33 Mich. 483; *Saratoga Bank v. King*, 44 N. Y. 87; *Filson v. Himes*, 5 Pa. St. 452; *Bredin's Appeal*, 92 Pa. St. 241; *Sumner v. Summers*, 54 Mo. 340; *Perkins v. Cummings*, 2 Gray (Mass.) 258; *Bishop v. Palmer*, 146 Mass. 409, 16 N. E. Rep. 299; *Clark v. Ricker*, 14 N. H. 44; *Roguet v. Roll*, 7 Ohio, 77; *Widoe v. Webb*, 20 Ohio St. 431; *McQuade v. Rosecranz*, 36 Ohio St. 442; *Tobey v. Robinson*, 99 Ill. 222; *Henderson v. Palmer*, 71 Ill. 579; *Miles v. Andrews*, 40 Ill. App. 135; *James v. Jellison*, 94 Ind. 202; *Ricketts v. Harvey*, 106 Ind. 564, 6 N. E. Rep. 325; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. Rep. 287; *Pettit v. Pettit*, 32 Ala. 288; *Woodruff v. Hinman*, 11 Vt. 592; *Chandler v. Johnson*, 39 Ga. 85. Thus, in Kansas, it is held that a chattel mortgage is entirely void if illegal as to one of the articles mortgaged (intoxicating liquors). *Gurlach v. Skinner*, 34 Kan. 86, 8 Pac. Rep. 257; *Flersheim v. Cary*, 39 Kan. 178, 17 Pac. Rep. 825. No recovery, for instance, can be had on the quantum meruit for services rendered in the grocery part of the business under a contract to work for agreed wages as bartender and clerk for a dealer in groceries and liquors, the sale of the latter being prohibited when the contract was made and the services rendered. *Sullivan v. Horgan*, 17 R. I. 109, 20 Atl. Rep. 232. A note under seal, if given in consideration of past illicit cohabitation, is valid, but is void if given for present or future illicit cohabitation. Ante, p. 439. A note, therefore, in consideration of both past and future cohabitation, is void in toto. *Massey v. Wallace*, 32 S. C. 149, 10 S. E. Rep. 937.

<sup>273</sup> Post, p. 475, note 281.

<sup>274</sup> *Widoe v. Webb*, 20 Ohio St. 431; *Deering v. Chapman*, 22 Me. 488; *Kidder v. Blake*, 45 N. H. 530; *Carleton v. Woods*, 23 N. H. 290; *Coburn v.*

The consideration, to bring a case within this principle, must be illegal and not merely void. If part of the consideration is merely void, and there is still a valid consideration left, it will support the promise, for, as we have seen, the law does not undertake to determine whether the consideration is adequate. It is only where part of the consideration is illegal that it taints the entire agreement.<sup>275</sup>

*Same—Divisible Agreements.*

Where, on the other hand, there are several promises, so that those which are legal can be separated from those which are illegal, the legal promises may be enforced. In other words, a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time, and for the same consideration.<sup>276</sup> So, also, where the agreement consists of several promises based on several considerations, the fact that one or more of the considerations is illegal will not avoid all the promises, if those which are based upon legal considerations are severable from others.<sup>277</sup>

Frequent illustrations of this rule are found in cases where a corporation has entered into an agreement some parts of which are ultra vires, and so, in a sense, unlawful. It is held in such cases that, "where you cannot sever the illegal from the legal part, \* \* \* the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."<sup>278</sup> These

Odell, 30 N. H. 540; Allen v. Pearce, 84 Ga. 606, 10 S. E. Rep. 1015; Braitch v. Guelick, 37 Iowa, 212; Cotten v. McKenzie, 57 Miss. 418. But see Shaw v. Carpenter, 54 Vt. 155; Wilcox v. Daniels, 15 R. I. 261, 3 Atl. Rep. 204.

<sup>275</sup> Cobb v. Cowdery, 40 Vt. 25; Widoe v. Webb, 20 Ohio St. 431; ante, pp. 160, 206.

<sup>276</sup> Pigot's Case, Coke, 11, 27; U. S. v. Bradley, 10 Pet. 343; Ohio v. Board, 35 Ohio St. 519; State v. Findley, 10 Ohio, 51; Erie Railway Co. v. Express Co., 35 N. J. Law, 240; Stewart v. Railway Co., 38 N. J. Law, at page 520; Presbery v. Fisher, 18 Mo. 50; Gelpcke v. City of Dubuque, 1 Wall. 175; Pennsylvania Co. v. Wentz, 37 Ohio St. 333; Ware v. Curry, 67 Ala. 274; U. S. v. Hodgson, 10 Wall. 395; U. S. v. Mora, 97 U. S. 413.

<sup>277</sup> Robinson v. Green, 3 Metc. (Mass.) 159. And see cases cited in the preceding note.

<sup>278</sup> Pickering v. Railway, L. R. 3 C. P. 250; Ohio v. Board, 35 Ohio St. 519.

cases serve as an illustration of the rule, but it must be remembered that agreements of this nature are invalidated not so much by the illegality of their objects as by the incapacity of the corporation to bind itself.<sup>279</sup>

The principle is frequently applied to contracts in restraint of trade. An agreement, for instance, not to engage in a business at a certain place, "or in any other place," though void as to the general restriction, is valid as to the partial restriction.<sup>280</sup> So, also, in the case of sales of various articles, some of which it is illegal to sell, if each article is sold for a separate price, the promises to pay are divisible, and a recovery may be had for the price of those articles which it was legal to sell.<sup>281</sup>

#### **SAME—DIRECT OBJECT UNLAWFUL BUT INTENTION INNOCENT.**

**205.** Where the direct object is illegal, the agreement is void, though the parties did not know of the illegality, since ignorance of law is no excuse.

**206. EXCEPTIONS—**This rule does not apply

(a) Where the agreement can be, and is, legally performed in a way not originally contemplated.

<sup>279</sup> *Ashbury Carriage Co. v. Riche*, L. R. 7 H. L. 653.

<sup>280</sup> *Peltz v. Eichele*, 62 Mo. 171; *Dean v. Emerson*, 102 Mass. 480; *Mallon v. May*, 11 Mees. & W. 653; *Hubbard v. Miller*, 27 Mich. 15; *Thomas v. Miles*, 3 Ohio St. 275; *Davies v. Lowen*, 64 Law T. 655; *Collins v. Locke*, 4 App. Cas. 674; *Smith's Appeal*, 113 Pa. St. 579, 6 Atl. Rep. 251. Contra, *More v. Bonnet*, 40 Cal. 251.

<sup>281</sup> Ante, p. 473, note 274. See *Carleton v. Woods*, 28 N. H. 290; *Shaw v. Carpenter*, 54 Vt. 155; *Barrett v. Delano* (Me.) 14 Atl. Rep. 288; *Walker v. Lovell*, 28 N. H. 138; *Boyd v. Eaton*, 44 Me. 51; *Chase v. Burkholder*, 18 Pa. St. 48. If a sale of a number of articles—a stock of goods, for instance—is for a gross price for the whole, the contract is indivisible, and, if a sale of some of the articles is prohibited, none of the price can be recovered. *Ladd v. Dillingham*, 34 Me. 316. And see *Holt v. O'Brien*, 15 Gray (Mass.) 311.

- (b) **Where a party performs his part in ignorance of a fact which renders performance illegal, and which he is not bound to know at his peril, since this is ignorance of fact, and not of law.**

Where the direct object of the parties is to do an illegal act, the agreement is void. In such a case it is immaterial that they did not know their object was illegal, for ignorance of law is no excuse.<sup>222</sup> A contract, for instance, in violation of a statute, cannot be sustained on the ground that the parties did not know of the existence of the statute.

Ignorance of illegality, however, may become important if the contract admits of being performed, and is in fact performed, in a legal manner, though a detail in the performance as originally contemplated by the parties would, unknown to them, have directly resulted in a breach of the law. In a leading case on this point the defendant had chartered the plaintiff's ship to take a cargo of hay from a port in France to London, the cargo to be taken "from the ship alongside" and landed at a certain wharf. Unknown to the parties an order in council had forbidden the landing of French hay. The defendant on learning this, instead of landing the cargo, took it "from the ship alongside" into another ship, and exported it. In an action by the plaintiff for delay of his vessel the defendant set up the unlawful intention as avoiding the contract, but without success. "We quite agree," it was said by the court, "that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think that, in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance."<sup>223</sup>

<sup>222</sup> *Favor v. Philbrick*, 7 N. H. 326.

<sup>223</sup> *Waugh v. Morris*, L. R. 8 Q. B. 202.

*Mistake of Fact.*

Though mistake of law does not excuse, it is otherwise in case of mistake of fact. If a person performs a contract in ignorance of facts which render performance illegal, and the law does not require him to know the facts at his peril,<sup>284</sup> he may nevertheless recover. A father, for instance, may recover for services performed by his minor son, in unlawfully selling intoxicating liquors if he did not know the character of the services while his son was performing them. In reference to the defense of illegality in such a case it was said: "This defense is founded on a well-settled rule of law, that the law will not lend its aid to carry into effect any agreement made for the purpose of accomplishing things expressly prohibited by law. It will therefore allow no action for the recovery of compensation for doing unlawful acts. The law is clear; the only question is whether it applies to this case. If the plaintiff did not place his son in the service of the defendant for the purpose of selling liquor illegally, more especially if he did not consent to it or know of it, then he is chargeable with no violation of law; and being, by the general rule of law, entitled to compensation for the services of his son, the defense is not maintained."<sup>285</sup>

So, also, it has been held that an actor may maintain an action for his services in an unlicensed theatrical exhibition, unless it appears that he knew that his employer had no license. As said in such a case: "It is ignorance of a fact, and not of the law, that saves the plaintiff's case. He undoubtedly knew, or was bound to know, that unlicensed theatrical exhibitions were unlawful; but he was not bound to know that the defendants had no license, and were doing unlawful acts."<sup>286</sup>

<sup>284</sup> Clark, Cr. Law, 69.

<sup>285</sup> Emery v. Kempton, 2 Gray (Mass.) 257. If, however, an agent sells liquor, for instance, knowing it is to be retailed in violation of law, his principal is charged with such knowledge. Fishel v. Bennett, 56 Conn. 40, 12 Atl. Rep. 102.

<sup>286</sup> Roys v. Johnson, 7 Gray (Mass.) 162. And see Bloxsome v. Williams, 3 Barn. & C. 232; Miller v. Hirschberg (Or.) 37 Pac. Rep. 85. As illustrating this principle may also be mentioned bonds given to indemnify an officer or private person assisting him against liability for seizing goods under attachment, or for arresting a person. If the officer knows the seizure or arrest to be unlawful, the bond is illegal; but it is otherwise if he acts in good



**SAME—OBJECT INNOCENT BUT INTENTION UNLAWFUL.**

207. Where the direct object of an agreement is innocent in itself, but the intention of both parties is unlawful, the agreement is void.

**EXCEPTION**—This does not apply where the illegal transaction is past, as where a person lends another money with which to pay a gambling debt.

208. Where the direct object of the agreement is innocent, but the intention of one of the parties is unlawful, as where goods are bought or money borrowed to be used for an unlawful purpose, the fact that the other party knows of such purpose does not render the agreement illegal, unless

- (a) As first above stated, he shares in the unlawful intention.
- (b) Or does some act in aid or furtherance of the other's unlawful design.
- (c) Or where the intention is to commit a crime which is not merely *malum prohibitum* or of inferior criminality.

209. If the direct object of the agreement is innocent, and there is an unlawful intention on one side only, of which the other party is ignorant, the latter is entitled to full benefits under the agreement, or, while the agreement is still executory, he may rescind it.

*The English Rule.*

Sir William Anson states that in England it is held that, where the direct object of a contract is innocent in itself, but is designed to

faith, and in ignorance of the illegality. *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Marsh v. Gold*, 2 Pick. (Mass.) 285; *Ives v. Jones*, 3 Ired. (N. C.) 538; *Anderson v. Farns*, 7 Blackf. (Ind.) 343; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Davis v. Tibbotts*, 7 J. J. Marsh. (Ky.) 264; *McCartney v. Shepard*, 21 Mo. 573.

further an illegal purpose, the contract is void if both parties knew of the illegal purpose at the time the contract was entered into; that, though there is nothing illegal in a loan of money or a sale of goods, still, if these are known to be intended to further an illegal purpose, neither the money lent, nor the goods supplied, can form the subject of an action; that the whole transaction is void;<sup>287</sup> but it is doubtful whether the cases cited by him go to that extent.

There are three leading English cases on this subject. In one of them goods had been transferred by a bankrupt to the defendant in part satisfaction of a bond which was to secure to the defendant the payment of money lent by him to the bankrupt to meet losses arising from stock-jobbing transactions which were illegal under a statute. It was held that the lending of the money, the bond, and the transfer of the goods were all alike void, and that the assignees of the bankrupt could recover the proceeds of the goods. It was said by the court: "Then, as the statute has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the making such payment is not an unlawful act. If it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object."<sup>288</sup>

In another case an action was brought to recover a sum of money lent, as the plaintiff knew, for the purpose of playing at a game of cards which was prohibited by statute. It was held that there could be no recovery, on the principle "that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced."<sup>289</sup>

<sup>287</sup> Anson, Cont. 192.

<sup>288</sup> Cannan v. Bryce, 3 Barn. & Ald. 179. It will be noticed that in this case the court said that the means were furnished "for the express purpose" of accomplishing the illegal object. There was, therefore, something more than a mere knowledge of the other party's unlawful intention. There was an unlawful intention on the part of both parties. There was intentional assistance.

<sup>289</sup> McKinnell v. Robinson, 3 Mees. & W. 435. It will be noticed in this case also that the money was loaned "for the express purpose" of accomplishing an illegal object.

In another case an action was brought to recover payment for the hire of a brougham engaged by a prostitute. It was found that the plaintiffs knew that the brougham was supplied for an immoral purpose, and it was held that they could not recover. "My difficulty was," said Bramwell, B., "whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense it was not for the same purpose. If a man were to ask for dueling pistols, and to say, 'I think I shall fight a duel tomorrow,' might not the seller answer, 'I do not want to know your purpose. I have nothing to do with it. that is your business. Mine is to sell the pistols, and I look only to the profit of the trade.' No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should feel it still but that the authority of *Cannan v. Bryce* and *McKinnell v. Robinson* concludes the matter."<sup>290</sup>

These cases seem to show that it is not necessary in England that the parties to a contract *prima facie* innocent should bind themselves to adapt it to an illegal purpose in order to avoid it. It is enough that the one party knows the unlawful intent of the other, and knows that the contract is intended to be applied to carry it out. This, at least, is Sir William Anson's construction of the English cases.

#### *The Rule in America.*

There is some direct conflict in the cases on this point, and it can scarcely be said that there is what may be called an "American doctrine." In some of the states the English doctrine, as shown above, has been substantially applied, while in others it has been applied in part only.<sup>291</sup> We can best arrive at a correct understanding

<sup>290</sup> *Pearce v. Brooks*, L. R. 1 Exch. 213. This case supports Anson's statement, but it seems to have gone further than the cases which the court followed, for, as we have seen, there was in both of them more than mere knowledge of the other party's unlawful intention. There was participation in that intention.

<sup>291</sup> Prof. Knowlton, in his edition of Anson, states that according to the weight of authority in this country a seller of goods is entitled to payment though he may have known that the buyer intended to make an illegal use of them; that, as a rule, he will not be deprived of his right to payment "unless (a) it be made a part of the contract of sale that the property shall

of the rules established by the weight of authority in this country by taking cases of sales of goods and loans of money for illustrations, as it is generally with reference to them that the question arises. We will also divide the subject, and, as some of the courts seem to have made a distinction between sales of goods and loans of money, we will treat them separately.

In the first place it is everywhere settled that, if it is a part of the contract under which the goods are sold that they shall be used for an unlawful purpose, then the contract is void, and the price cannot be recovered; and the same is no doubt true where goods are sold for the express purpose of enabling the buyer to accomplish an unlawful purpose, for in the latter case there is an unlawful intention on the part of both parties.<sup>292</sup>

It is also settled that if, in addition to a sale of goods which the vendor knows are to be used for an illegal purpose, he does some act in aid or furtherance of the unlawful design, his contract is void, and he cannot recover the price. An example of such a case is where a person who sells goods not only knows that his vendee intends to smuggle them into the country, but packs them up or marks them in a manner convenient for the purpose, with a view of their being smuggled.<sup>293</sup>

be used for an unlawful purpose; or (b) unless the vendor does something beyond making the sale in aid or furtherance of the unlawful design; or (c) unless the illegal act contemplated is such that no man 'having a knowledge of the design can remain neutral without being in a just sense a criminal himself. Where the design is to violate the fundamental laws of society, a positive duty of intervention may arise.' " Page 192.

<sup>292</sup> *Talmadge v. Pell*, 7 N. Y. 328. It has been held, for instance, that if liquor is sold for the express purpose of enabling the buyer to retail it in violation of law, the sale is illegal. *Kohn v. Melcher*, 43 Fed. Rep. 641. It has also been held that if a house is knowingly leased to be used as a bawdy-house, or for any other unlawful purpose, the rent cannot be recovered. *Dougherty v. Seymour*, 16 Colo. 289, 26 Pac. Rep. 823; *Ashbrook v. Dale*, 27 Mo. App. 649; *Ernst v. Crosby*, 21 N. Y. Supp. 365, 66 Hun, 633; *Id.*, 140 N. Y. 364, 35 N. E. Rep. 603; *Riley v. Jordan*, 122 Mass. 231; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. Rep. 294; *Edelmuth v. McGarren*, 4 Daly (N. Y.) 467; *Ralston v. Boady*, 20 Ga. 449; *Sherman v. Wilder*, 106 Mass. 537.

<sup>293</sup> *Tracy v. Talmage*, 14 N. Y. 162; *Waymell v. Reed*, 5 Term R. 590; *Gaylord v. Soragen*, 32 Vt. 110; *Arnot v. Coal Co.*, 68 N. Y. 566; *Alken v.*

If the vendor of goods knows that they are to be used for the perpetration of a crime which is not merely *malum prohibitum* or of inferior criminality, even though he may not expressly stipulate that they shall be so used, and though he does nothing further than furnishing them to aid in such use, the contract of sale is illegal and void, and he cannot recover the price.<sup>294</sup> It seems that it is otherwise where the crime intended to be perpetrated is merely *malum prohibitum* or of inferior criminality.<sup>295</sup>

If the particular circumstances do not bring the contract of sale within any of the cases mentioned above, then, according to the weight of authority in this country, the contract of sale is not illegal merely because the vendor knew that the goods were intended to be used for an unlawful purpose.<sup>296</sup> "The law," it is said in a New

Blaisdell, 41 Vt. 655; *Foster v. Thurston*, 11 Cush. (Mass.) 322; *Skiff v. Johnson*, 57 N. H. 475; *Bancher v. Mansel*, 47 Me. 58. Concealing and disguising form of liquor sold, in order to evade the law. *Alken v. Blaisdell*, supra. In Massachusetts the court has shown an inclination to follow the English rule on this point. In *McIntyre v. Parks*, 3 Metc. (Mass.) 207, it was held that the bare fact of knowledge on the part of the vendor of the vendee's unlawful intent was not enough to avoid the sale; but this case, though not overruled, was criticised in a later case in which it was said: "If the case of *McIntyre v. Parks* is good law, it cannot be said that a sale made in another state, and valid by the law of that state, will be held void in this commonwealth, from the bare fact of the knowledge or belief of the vendor of the purchaser's intent to resell in this state in violation of law. The rule of that case, if rightly decided (in my judgment it was not), is not to be extended, and the case at bar does not fall within it. The distinction is sound between a case where a seller simply has knowledge of the illegal design, no more, and where, having such knowledge, he makes a sale 'with a view' to such design, and for the purpose of enabling the purchaser to effect it." *Webster v. Munger*, 8 Gray (Mass.) 584. And see *Hubbard v. Moore*, 24 La. Ann. 591; *Sampson v. Townshend*, 25 La. Ann. 78; *Fishel v. Bennett*, 56 Conn. 40, 12 Atl. Rep. 102.

<sup>294</sup> *Hanauer v. Doane*, 12 Wall. 342; *Tatum v. Kelley*, 25 Ark. 209; *Lightfoot v. Tenant*, 1 Bos. & P. 556; *Langton v. Hughes*, 1 Maule & S. 593; *Tracy v. Talmage*, 14 N. Y. 162; *Howell v. Stewart*, 54 Mo. 400.

<sup>295</sup> *Hanauer v. Doane*, supra; *Gaylord v. Soragen*, 32 Vt. 110; *Hodgson v. Temple*, 5 Taunt. 181; *Howell v. Stewart*, 54 Mo. 404.

<sup>296</sup> *Tracy v. Talmage*, 14 N. Y. 162; *Hill v. Spear*, 50 N. H. 253; *Anheuser-Busch Brewing Ass'n v. Mason*, 44 Minn. 318, 46 N. W. Rep. 558; *McIntyre v. Parks*, 3 Metc. (Mass.) 207; *Hanauer v. Doane*, 12 Wall. 342; *Bickel v. Sheets*, 24 Ind. 1; *Hodgson v. Temple*, 5 Taunt. 181; *Gaylord v. Soragen*,

York case, "does not punish a wrongful intent when nothing is done to carry that intent into effect; much less bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not necessarily per se a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money."<sup>297</sup>

According to the weight of authority, if a person lends money to another for the express purpose of enabling the borrower to use it to accomplish an illegal object, the transaction is illegal, and he cannot recover it.<sup>298</sup> This also seems to be the true construction of the two English cases which we have mentioned, for the judges in both of them stated that the money was loaned for the express purpose of its being used illegally.

It is not easy to draw any legal distinction in respect to the legality of the transaction between a loan of money to be used for an illegal purpose and a sale of goods to be so used, and probably there is no distinction. If it could be shown that goods were sold,

32 Vt. 110 (but see *Territt v. Bartlett*, 21 Vt. 184; *McConihe v. McMann*, 27 Vt. 95); *Walker v. Jeffries*, 45 Miss. 160; *Webber v. Donnelly*, 33 Mich. 409; *Cheney v. Duke*, 10 Gil & J. (Md.) 11; *Michael v. Bacon*, 49 Mo. 474; *Curran v. Downs*, 3 Mo. App. 468; *Hedges v. Wallace*, 2 Bush (Ky.) 442; *Armfield v. Tate*, 7 Ired. (N. C.) 258; *Rose v. Mitchell*, 6 Colo. 102; *McKinney v. Andrews*, 41 Tex. 363 (but see *Rochemore v. Alloway*, 33 Tex. 461); *Howell v. Stewart*, 54 Mo. 400; *Kreiss v. Seligman*, 8 Barb. (N. Y.) 439; *Kerwin v. Doran*, 29 Mo. App. 397; *Delavina v. Hill*, 65 N. H. 94, 19 Atl. Rep. 1000; *Gambs v. Sutherland* (Mich.) 59 N. W. Rep. 652. But see *Spurgeon v. McElwain*, 6 Ohio, 442.

<sup>297</sup> *Tracy v. Talmage*, supra.

<sup>298</sup> *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. Rep. 356; *White v. Buss*, 3 Cush. (Mass.) 448; *Ruckman v. Bryan*, 3 Denio (N. Y.) 340; *Peck v. Briggs*, Id. 107; *Cutler v. Welsh*, 43 N. H. 497; *Wright v. Crabbs*, 78 Ind. 487; *Mordecal v. Dawkins*, 9 Rich. Law (S. C.) 262; *Williamson v. Baley*, 78 Mo. 636; *Emerson v. Townsend*, 73 Md. 224, 20 Atl. Rep. 984; *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. Rep. 525; *Critcher v. Holloway*, 64 N. C. 526; *Viser v. Bertrand*, 14 Ark. 267. It has been said, however, that money, though loaned for the purpose of being used for gambling purposes, may be recovered, if it was not in fact so used. *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. Rep. 356.

not for the purpose of making the profit on the transaction, but for the real purpose of enabling the buyer to use them in accomplishing an illegal object, it might well be said that the seller intended to and did aid in the unlawful purpose; and no doubt he would not, in such a case, be allowed to recover the price. As a rule, however, it is a matter of indifference to the seller what use the buyer makes of the goods, his purpose being merely to make the sale. So, also, where money is loaned, it may be for the purpose of an investment, or the lender may merely wish to accommodate the borrower; and in such cases he does nothing illegal, even though he knows that the borrower intends to use the money in violation of law. He may disapprove of the borrower's purpose, and try to dissuade him, and yet may not be willing to refuse him the loan. In such a case it cannot be said that he lends the money with the express purpose of its being used to accomplish an illegal object. To bring the loan within the rule above stated, he must intend that it shall be so used.

In a leading case it is said: "The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling at the trial was that if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered, but otherwise if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct. Any different doctrine would, in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man, and not to his purpose. He may at the same time disapprove of his purpose. He may not be willing to deny his friend, however much disapproving his acts. In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower,—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act,—be himself implicated in it. He must loan his money for the express purpose of promoting the illegal

design of the borrower; not intend merely to serve or accommodate the man."<sup>299</sup>

*Distinction where Illegal Act is Past.*

A loan of money, designed to satisfy debts arising from a past illegal transaction, is distinguishable from the cases which we have mentioned. In the first English case mentioned above, the statute had forbidden not only stock-jobbing transactions of a certain sort, but advances of money to pay debts arising from them; in the other two the illegality was still in contemplation when the contract was made.

A loan of money, intended to pay lost bets, has been held to be recoverable. "The mischief had been completed," it was said in such a case. "The illegal act had been carried out before the money was lent. The money was advanced to enable the borrower to pay the bets which he had already made and lost, which seems to me an entirely different thing from a loan of money to enable a man to make a bet."<sup>300</sup>

*Unlawful Intention on One Side Only.*

Where one of the parties intends a contract, innocent in itself, to further an illegal purpose, and the other enters into the contract in ignorance of his intention, the innocent party is entitled to full benefits under the contract.<sup>301</sup> In the case of contracts of sale for future delivery, for instance, if one of the parties intends a bona fide sale, he may enforce the contract, though the other party may have intended no actual sale, but merely an illegal speculation on future prices.<sup>302</sup>

<sup>299</sup> *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. Rep. 356. And see *Plank v. Jackson*, 128 Ind. 424, 26 N. E. Rep. 568, and 27 N. E. Rep. 1117; *Jackson v. Bank*, 125 Ind. 347, 25 N. E. Rep. 430; *Howell v. Stewart*, 54 Mo. 400; *Lyon v. Respass*, 1 Litt. (Ky.) 133; *Lewis v. Alexander*, 51 Tex. 578; *Waugh v. Beck*, 114 Pa. St. 422, 6 Atl. Rep. 923; *Jones v. Planters' Bank*, 9 Heisk. (Tenn.) 455.

<sup>300</sup> *Pyke's Case*, 8 Ch. Div. 750. And see *Armstrong v. Toler*, 11 Wheat. 258; *Read v. Anderson*, 13 Q. B. Div. 779; *Armstrong v. Bank*, 133 U. S. 433, 10 Sup. Ct. Rep. 450.

<sup>301</sup> *Pixley v. Boynton*, 79 Ill. 351; *Quirk v. Thomas*, 6 Mich. 76.

<sup>302</sup> *Williams v. Tiedeman*, 6 Mo. App. 269; *Pixley v. Boynton*, *supra*; *Whitesides v. Hunt*, 97 Ind. 191; *Gregory v. Wendell*, 39 Mich. 337. So, also, where a broker is employed to make sales or purchases for future



On the other hand, it has been held that if the contract is still executory, he is not bound to go on with it, but may avoid it at his option. As to the latter proposition, however, there is some difference of opinion. In an action for breach of an agreement by the defendant to let to plaintiff a set of rooms, it appeared that the plaintiff intended to use the rooms for the purpose of delivering blasphemous lectures, which were unlawful under a statute, though the defendant was not aware of such a purpose when the agreement was made. He afterwards refused to allow the plaintiff to use the rooms. It was held that he was entitled to avoid the contract.<sup>303</sup> In New York there is a decision in conflict with this rule, in which it was held that a lessee could recover damages for the lessor's refusal to give possession of the demised premises, though they were rented by the lessee for the purpose of keeping a house of prostitution therein. The court thought that if the lessee carried out such purpose the statute against disorderly houses would protect the lessor, and remedy the evil.<sup>304</sup>

#### **SAME—PROMISES TO PAY MONEY DUE ON ILLEGAL TRANSACTIONS.**

**210.** The effect of a promise to pay money due or to become due upon an illegal transaction may be stated as follows:

- (a) Where the transaction was illegal in the strict sense, and not merely void and unenforceable.

delivery, he can recover his commissions, and for losses and disbursements, though the principal intended mere gambling transactions, if he did not know of such unlawful intention. Post, 502. As we have seen, a promise by a married man to marry another woman after his wife shall die is illegal, and the promisee cannot recover for its breach where she knew that he was married when she accepted his offer. It is otherwise if she did not know of his being married. In the latter case she is innocent, and the illegality of the contract will not prevent her from recovering damages for breach of the promise. Ante, p. 445, note 215.

<sup>303</sup> Cowan v. Milbourn, L. R. 2 Exch. 230. And see Clay v. Yates, 1 Hurl. & N. 78.

<sup>304</sup> O'Brien v. Prietenbach, 1 Hilt. (N. Y.) 304.

the promise, not being in the form of a negotiable instrument, is void, whether under seal or not.

- (b) Where the transaction was not illegal, but merely void and unenforceable, a parol promise, not being in the form of a negotiable instrument, is void as without consideration; but at common law a promise under seal is valid.
- (c) Where the promise is in the form of a negotiable instrument the above rules still apply as between the immediate parties, and as against all persons who are not bona fide purchasers for value. In the hands of bona fide purchasers for value the instrument is valid, whether the transaction was illegal or merely void, unless a statute expressly declares that the instrument shall be void.

Where a promise has been given to secure the payment of money due or about to become due upon an illegal transaction, the validity of such a promise, as between the immediate parties, or others occupying the same position, is based upon two considerations: (1) Whether the transaction was illegal or merely void, and (2) whether or not the promise is made under seal. Where the promise is given in the form of a negotiable instrument, a further question arises as to its value in the hands of third parties, but it will prevent confusion if we treat of the latter question separately.

There is a distinction, not very easy to analyze, but of considerable practical importance, between cases in which the common law or statutes make an object illegal, and cases in which they make it merely void. The effect of the difference is this: that in the one case the promise is regarded as given upon an illegal consideration, while in the other it is regarded as given on no consideration at all. In the first case everything connected with the transaction is "tainted with illegality," while in the second collateral contracts arising out of the avoided transaction are, under certain circumstances, supported.

In cases where the transaction is illegal, a promise, even under seal, given to secure the payment of money due upon it, is void. In

an action upon a covenant to pay money, in which the defense was that the covenant was security for the payment of a sum of money due upon a purchase of land agreed to be sold for a purpose declared to be illegal by statute, the court of queen's bench held that the defendant was bound, inasmuch as there was nothing unlawful in a simple promise to pay money; but the court of exchequer chamber, reversing the judgment, held that the illegality, when proved, tainted the subsequent promise, and that this was not a simple promise to pay money, but that it "springs from and is the creature of the illegal agreement."<sup>305</sup> It will be noticed that in the case mentioned the promise was under seal, but that made no difference. At common law, as we have already seen, want of consideration will not defeat a sealed contract, for no consideration at all is necessary; but the seal will not prevent the contract from being void because the consideration, where there was a consideration, was illegal. The objection on the ground of illegality is "rather that of the public, speaking through the court, \* \* \* not from any consideration of the moral position and rights of the parties, but upon grounds of public policy."<sup>306</sup>

Where the consideration is not illegal, but the transaction is merely void, a promise given to pay money due upon such a transaction is based upon no consideration at all. If made under seal, it is binding at common law, for no consideration is then necessary; but, if made by parol, it is void. Where a municipal corporation, for instance, borrowed money, and gave a mortgage, which a statute declared it unlawful for them to give without complying with certain conditions which they failed to observe, it was held that, though the mortgage was invalid, the corporation was liable on its covenant therein to repay the money it had received.<sup>307</sup> So, also,

<sup>305</sup> *Fisher v. Bridges*, 3 El. & Bl. 642. And see *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. Rep. 269; *Clafin v. Torlina*, 56 Mo. 369; *Howe v. Litchfield*, 3 Allen (Mass.) 443; *Stanton v. Allen*, 5 Denio (N. Y.) 435; *Holden v. Cosgrove*, 12 Gray (Mass.) 216; *Hall v. Gavitt*, 18 Ind. 390; *Crossley v. Moore*, 40 N. J. Law, 27; *Chancely v. Bailey*, 37 Ga. 532; *Coulter v. Robertson*, 14 Smedes & M. (Miss.) 18.

<sup>306</sup> *Lyon v. Waldo*, 36 Mich. 345, 353. See *Parks v. McKamy*, 3 Head (Tenn.) 297; *Wooden v. Shotwell*, 23 N. J. Law, 465; *Buffendeau v. Brooks*, 28 Cal. 641; *Seldenbender v. Charles*, 4 Serg. & R. (Pa.) 151.

<sup>307</sup> *Payne v. Mayor of Brecon*, 3 Hurl. & N. 579.

in case of promises of payment made in consideration of past illicit cohabitation, the promises are invalid if made by parol; not on the ground that the consideration is illegal, but because there is in fact no consideration at all.<sup>308</sup> At common law, a bond given upon such a past consideration, because of the seal, would be binding.<sup>309</sup>

It is often a difficult question to determine whether a given contract is illegal or merely void, and there is much direct conflict in the decisions. Of course there can be no question but that it is illegal where it involves the commission of a crime which is *malum in se*, or where it involves the commission of a fraud on third persons, or where it is contrary to public policy; but it is not so easy to declare a transaction illegal in the strict sense, where it is only unlawful because prohibited by statute. In an English case it was held that a note given to secure the payment of money under a wagering contract did not take its inception in illegality within the meaning of the rule we have been discussing. "There is no penalty attached to such a wager," it was said. "It is not in violation of any statute, nor of the common law, but is simply void; so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all."<sup>310</sup> In those of our states where wagers are held contrary to public policy, even where there is no statute prohibiting them, the ruling on this point would no doubt be different.

### *Negotiable Instruments.*

In the case of negotiable instruments we have to consider not only the effect of the illegality as between the original parties, but the effect upon subsequent holders of the instrument. A negotiable instrument given upon an illegal transaction is like any other simple contract as between the immediate parties, and cannot be enforced unless it has passed into the hands of a bona fide purchaser for value.<sup>311</sup> Whether it can be enforced in the latter event will depend on the circumstances. The position of such a purchaser may be shortly stated as follows:

<sup>308</sup> *Beaumont v. Rove*, 8 Q. B. 483.

<sup>309</sup> *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

<sup>310</sup> *Fitch v. Jones*, 5 El. & Bl. 245.

<sup>311</sup> *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. Rep. 776.

(1) If the transaction in which the instrument was given was not illegal, but merely void, so that the instrument is based, not on an illegal consideration, but on no consideration at all, it may be enforced by one who purchased the same for value before maturity, and without notice of the want of consideration. In such a case there is a presumption that the holder paid value, and had no notice of want of consideration.<sup>312</sup>

(2) If the transaction in which the instrument was given was illegal, but it is not expressly declared that the instrument shall be void, a bona fide holder for value may enforce it. "If the legislature has declared that the illegality of the contract or consideration shall make the note void, the defendant may set up that defense, though the note be in the hands of a bona fide holder;<sup>313</sup> but unless it has been so expressly declared by the legislature, illegality of consideration will be no defense against a bona fide holder, without notice, and for sufficient consideration, unless he obtained the note after it became due."<sup>314</sup> In such a case, however, the ordinary presumption in favor of the holder does not exist. Upon proof of the illegality which tainted the instrument in its inception, the holder

<sup>312</sup> Norton, Bills & N. 242; Mechanics', etc., Bank v. Crow, 60 N. Y. 85; Harger v. Worrall, 69 N. Y. 370; Little v. Mills, 98 Mich. 423, 57 N. W. Rep. 266.

<sup>313</sup> Aurora v. West, 22 Ind. 88; Lagonda Nat. Bank v. Portner, 46 Ohio St 381, 21 N. E. Rep. 634; Meadow v. Bird, 22 Ga. 246; Unger v. Boas, 13 Pa. St. 601; Gough v. Pratt, 9 Md. 526; Bridge v. Hubbard, 15 Mass. 96; Snoddy v. Bank, 88 Tenn. 573, 13 S. W. Rep. 127; Harper v. Young, 112 Pa. St. 419, 3 Atl. Rep. 670; Andrews v. Hoxie, 5 Tex. 171; Emerson v. Townsend, 73 Md. 224, 20 Atl. Rep. 984; Lucas v. Waul, 12 Smedes & M. (Miss.) 157; Farris v. King, 1 Stew. (Ala.) 255; Mordecai v. Dawkins, 9 Rich. Law (S. C.) 262; Traders' Bank v. Alsop, 64 Iowa, 97, 19 N. W. Rep. 863. Cases cited in note 1, *infra*.

<sup>314</sup> Vallett v. Parker, 6 Wend. (N. Y.) 613; Town of Eagle v. Kohn, 84 Ill. 292; Sondhelm v. Gilbert, 117 Ind. 71, 18 N. E. Rep. 687; Glenn v. Farmers' Bank, 70 N. C. 191; Fuller v. Green, 64 Wis. 159, 24 N. W. Rep. 907; Bayley v. Taber, 5 Mass. 286; Paton v. Colt, 5 Mich. 505; Root v. Merriam, 27 Fed. Rep. 909; Crawford v. Spencer, 92 Mo. 498, 4 S. W. Rep. 713; Shaw v. Clark, 49 Mich. 384, 13 N. W. Rep. 786; Thorne v. Yontz, 4 Cal. 321; Meadow v. Bird, 22 Ga. 246; Johnson v. Dickson, 1 Blackf. (Ind.) 236; Rockwell v. Charles, 2 Hill (N. Y.) 499; Knox v. White, 20 La. Ann. 326. But see Cunningham v. Bank, 71 Ga. 400.

must show that he paid value for the instrument; and even then, if it is shown that he knew of the illegality, he cannot recover.<sup>315</sup> Some courts even hold that the burden is on the holder to show that he had no notice of the illegality.<sup>316</sup>

#### **SAME—RELIEF OF PARTY TO UNLAWFUL AGREEMENT.**

211. In no case can an action be maintained to enforce an illegal agreement.

212. Where an agreement has been executed in whole or in part by the payment of money or the transfer of other property, the court will not generally lend its aid to recover it back. The rule is that the court will not lend its aid to a party who, as the ground of his claim, must disclose an illegal transaction. This rule is subject to exceptions as follows, where the action is brought, not to enforce the agreement, but in disaffirmance of it:

**EXCEPTIONS—**(a) In some cases a *locus poenitentiae* remains, and, while the agreement is unperformed, money or goods delivered in furtherance of it are allowed to be recovered.

(b) Where the parties are not in *pari delicto*, the one who is less guilty may recover what he has parted with, as

(1) Where the party asking relief was induced to enter into the agreement under the influence of fraud or strong pressure.

(2) Where the law which makes the agreement unlawful was intended for the protection of the party asking relief.

<sup>315</sup> Note 313, *supra*.

<sup>316</sup> *Norton, Bills & N.* 243; *Canajoharie Bank v. Diefendorf*, 123 N. Y. 191, 23 N. E. Rep. 191; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. Rep. 801; *McDonald v. Aufdengarten* (Neb.) 59 N. W. Rep. 762; *State Nat. Bank v. Bennett* (Ind. App.) 36 N. E. Rep. 551.

**213. A broker, or other agent, employed to carry out an illegal transaction, cannot recover for losses incurred or disbursements made by him in the course of the transaction, if he was privy to the principal's unlawful purpose.**

It is a well-settled rule that in no case will the court lend its aid to the enforcement of an illegal agreement. Further than this, if the agreement has been executed, in whole or in part, by the payment of money or transfer of property, the court will not, as a rule, entertain an action to recover it back. At first thought it may seem wrong to allow a man to set up his own wrong to escape liability on an agreement, and all the more so to allow one who has received money under an illegal agreement to set up the illegality for the purpose of holding his ill-gotten gain, but the rule is necessary on the ground of public policy. "The objection," said Lord Mansfield in a leading case, "that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, '*potior est conditio defendentis*.'" <sup>217</sup>

As we have said, therefore, a party to an illegal agreement cannot, under any circumstances, come into a court of law or equity and ask to have his illegal objects carried out; nor, as a rule, can he

<sup>217</sup> *Holman v. Johnson*, 1 Cowp. 341; *Frost v. Gage*, 3 Allen (Mass.) 560; *Shenk v. Phelps*, 6 Bradw. (Ill.) 612.

ask the court to relieve him from the effect of his agreement. He cannot set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.<sup>318</sup> This rule is expressed

<sup>318</sup> *Begbie v. Sewage Co.*, L. R. 10 Q. B. 499; *Barclay v. Pearson* [1893] 2 Ch. 154; *Scott v. Brown* [1892] 2 Q. B. 724; *Frost v. Gage*, 3 Allen (Mass.) 560; *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. Rep. 600; *Hill v. Freeman*, 73 Ala. 200; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. Rep. 287; *Gotwalt v. Neal*, 25 Md. 434; *Roman v. Mall*, 42 Md. 513; *Freeman v. Sedgwick*, 6 Gill (Md.) 28; *Shoemaker v. Bank*, 31 Md. 402; *Bartle v. Coleman*, 4 Pet. 184; *Miller v. Marckle*, 21 Ill. 152; *Skeels v. Phillips*, 54 Ill. 309; *Myers v. Meinrath*, 101 Mass. 306. It has been held by some courts that if money has been actually paid to an agent for the use of his principal, the legality of the transaction of which it was the fruit does not affect the right of the principal to recover it out of the agent's hands, on the ground that, though the law would not have assisted the principal by enforcing the recovery of it from the party by whom it was paid, because it is the policy of the law not to aid the completion of an illegal contract, yet, when that contract is at an end, the agent, whose liability arises solely from having received the money for another's use, can have no right to retain it. *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, Id. 295; *McBlair v. Gibbs*, 17 How. 236; *Brooks v. Martin*, 2 Wall. 70 (in the latter case, among others, the principle was applied so as to allow one member of a firm formed for the purpose of illegal transactions to recover from the other member his share of the profits). See, also, in support of this doctrine, *State v. Railroad Co.*, 34 Md. 344, at page 365; *Bonsfield v. Wilson*, 16 Mees. & W. 135; *Haacke v. Knights of Liberty*, 76 Md. 429, 25 Atl. Rep. 422; *Daniels v. Barney*, 22 Ind. 207; *Peters v. Grim*, 149 Pa. St. 163, 24 Atl. Rep. 192. On the other hand, a great many courts refuse to allow a recovery in such a case, holding that to do so would be substantially to enforce, or at any rate to recognize, the illegal contract. This seems to be the better doctrine, and is more consistent with the other principles of law in relation to illegal contracts. It is well settled that a man who has paid money in performance of an illegal contract cannot recover it back if he was in pari delicto with the other party. The other party gets a benefit from the contract simply because the law will not recognize it or grant relief from it. It leaves the parties where they have placed themselves. There is certainly as little reason in recognizing the contract, as the court must recognize it in order to allow a principal or partner to recover profits growing out of it. "The sentiment of 'honor among thieves' cannot be enforced in courts of justice." See *Woodworth v. Bennett*, 43 N. Y. 273; *Clarke v. Brown*, 77 Ga. 606; *Lemon v. Grosskopf*, 22 Wis. 447; *Jackson v. McLean*, 36 Fed. Rep. 213; *Craft v. McConoughy*, 79 Ill. 346; *Neustadt v. Hall*, 58 Ill. 172; *Skeels v. Phillips*, 54 Ill. 309; *Green v. Corrigan*, 87 Mo. 359; *Edgar v. Fowler*, 3 East, 222. It may be well to



in the maxim, "*In pari delicto potior est conditio defendentis*;" that is to say, where the parties are equally in fault the condition of the defendant is the better. The law, in such a case, will leave the parties where it finds them. "There is no case to be found," said Lord Kenyon, "where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being participes criminis, an action has been maintained to recover it back again."<sup>319</sup>

There are some exceptional cases, however, to which this maxim does not apply, cases in which a man may be relieved from an illegal agreement. These may be grouped as: (a) Cases in which a locus poenitentiae remains, and while the agreement is unperformed money or goods delivered in furtherance of it are allowed to be recovered. (b) Cases in which the parties are not regarded as being in *in pari delicto*, as (1) where the party asking relief was induced to enter into the agreement under the influence of fraud or strong pressure, or (2) where the law which makes the agreement unlawful was intended for the protection of the party asking relief.

#### *Locus Poenitentiae.*

Although there is some difference of opinion on the subject, it is safe to say that in some cases of illegal agreements, at least if they are not mala in se, but merely mala prohibita, a locus poenitentiae remains, and that, while the illegal object has not been carried out by performance of the agreement, money paid or goods delivered under it may be recovered.<sup>320</sup> In a leading English case

mention that in many states it is expressly provided by statute that persons who have lost money by gambling may, under certain circumstances, recover it back.

<sup>319</sup> *Howson v. Hancock*, 8 Term R. 575; *Perkins v. Savage*, 15 Wend. (N. Y.) 412; *Burt v. Place*, 6 Cow. (N. Y.) 431.

<sup>320</sup> *Taylor v. Bowers*, 1 Q. B. Div. (Court of Appeal) 291; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. Rep. 356; *Barclay v. Pearson* [1893] 2 Ch. 154; *Hampden v. Walsh*, 1 Q. B. Div. 189; *Clarke v. Brown*, 77 Ga. 606; opinion of Dwight, C., in *Knowlton v. Congress Spring Co.*, 57 N. Y. 518, at page 540; *Id.*, 103 U. S. 49; *Peters v. Grim*, 149 Pa. St. 163, 24 Atl. Rep. 192; *Wheeler v. Spencer*, 15 Conn. 28; *House v. McKenney*, 46 Me. 94; *Skinner v. Henderson*, 10 Mo. 205; *Adams Exp. Co. v. Reno*, 48 Mo. 264; *Gowan v. Gowan*, 30 Mo. 472; *Stacey v. Foss*, 19 Me. 335; *Sonhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Shannon v. Baumer*, 10 Iowa, 210; *Hodson v. Terrill*, 1 Crompt. & M. 797; *Hastelow v. Jackson*, 8 Barn. & C. 221; *Martin v. Hewson*, 10 Exch. 737; note 322, *infra*. "Where money has been paid upon an

on this point the plaintiff had made a fictitious assignment of goods to a third party, to defraud his creditors, and the defendant, with a knowledge of the circumstances, had taken a bill of sale of the goods from the assignee, and afterwards, though the plaintiff demanded them back, had caused them to be put up at auction and sold. Nothing further had been done in respect of the fraud contemplated against the creditors, and the plaintiff was allowed to recover, on the ground that, as the illegal purpose was not carried out, there was a *locus poenitentiae*. "If money is paid," it was said in that case, "or goods delivered, for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits until the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."<sup>221</sup>

So, also, in a case where persons had each deposited money with another on a wager, and one of them, after a decision of the wager against him, but before the money was paid over, demanded it back, he was allowed to recover.<sup>222</sup>

illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid, but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books: that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but, where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover." 2 Comyn, Cont. 361. "It best comports with public policy to arrest the illegal proceeding before it is consummated." *Stacey v. Foss*, 19 Me. 335.

<sup>221</sup> *Taylor v. Bowers*, *supra*; *Knowlton v. Congress Spring Co.*, *supra*; *Gowan v. Gowan*, *supra*.

<sup>222</sup> *Hampden v. Walsh*, *supra*. And see *Fisher v. Hildreth*, 117 Mass. 558; *Bernard v. Taylor*, 23 Or. 416, 31 Pac. Rep. 968; *Lewis v. Bruton*, 74 Ala. 317; *Weaver v. Harlan*, 48 Mo. App. 319; *McDonough v. Webster*, 68 Me. 530; *McAllister v. Hoffman*, 16 Serg. & R. (Pa.) 147; *Tyler v. Carlisle*, *supra*;

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In these cases the illegal object had not been effected when the plaintiff sought to withdraw. On the other hand, there is a class of cases in which money or goods may be wholly or partially intact in the hands of the party to the agreement, with whom they have been deposited in order to effect an illegal object; and the question has arisen whether the illegal object may not be effected by the mere deposit of the money or goods, and before they have been spent on the object contemplated. In an English case the defendant had agreed with the plaintiff to go bail for him for a specified time if the plaintiff would deposit with him the amount of the bail as an indemnity against his (plaintiff's) possible default, the defendant undertaking to return the money at the expiration of the specified time. Before the time had expired, the plaintiff sued for the money, on the ground that the agreement was illegal, and that he was entitled to rescind it. In a similar case it had been held that, as the money was still in the hands of the defendant, and the recognizances had not been forfeited, the *locus poenitentiae* existed, and the money could be recovered.<sup>323</sup> In the present case this decision was overruled, and it was held that the illegal purpose was effected when the public lost "the protection which the law affords for securing the good behavior of the plaintiff;" for, as it was said, "when a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound, at his peril, to see that his principal obeys the order of the court. \* \* \* But if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed."<sup>324</sup>

So, also, where a person placed money to the credit of a corporation to give it a fictitious credit in case of inquiries, the money to be returned to him at a specified time, and he sued to recover the same after the company had gone into liquidation, he was not

Stacey v. Foss, *supra*; Wheeler v. Spencer, *supra*; House v. McKenney, *supra*; Shannon v. Baumer, *supra*; Hodson v. Terrill, *supra*; Hastelow v. Jackson, *supra*; Martin v. Hewson, *supra*.

<sup>323</sup> Wilson v. Strugnell, 7 Q. B. Div. 548.

<sup>324</sup> Herman v. Jenchner, 15 Q. B. Div. 561.

allowed to recover, because "the object for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding-up."<sup>325</sup>

The New York court has disputed this doctrine. In a case in which it was sought to recover payments made under an illegal agreement it was said: "The authorities relied on by the appellant to show that he, by his refusal to make further payments, was entitled to recover where there has been a rescission of the contract when still executory (supposing that under consideration to be such), on the principle that a party can avail himself of a *locus poenitentiae* to retrace his steps and disaffirm the unlawful agreement, has no application to this case. The recovery in some of the cases cited was permitted on the ground that the contracts were wager or gambling contracts, or of that character where the benefit to be received by the party paying the money was dependent on a future contingent event, not under the control of the party to whom the payment was made, or capable of performance by his own act. And the claim to recover back the money paid, or the 'deposit,' as it is termed in some of the cases, was made before the event contemplated had happened. In other cases the parties stood in such a relation that one was considered to have paid his money under oppression or extortion, or some other circumstance showing an inequality of position, by reason of which an improper influence or control was presumed to have been exercised over him by the other party; and the rest were cases where the illegality of the contract arose from a positive prohibition of law imposed on one of the parties to it.

\* \* \* The parties in those cases were not considered as in *pari delicto*. We have not been referred to any authority, nor have I found any, where money, paid in part performance and in furtherance of an illegal contract, has been recovered back, where both parties were *particeps criminis* and in *pari delicto*, and where its execution was in the control of the contracting parties themselves. There are, I concede, dicta and declarations in some of the elementary works, where the contrary rule or principle is apparently laid down without limitation or restriction; but it will be found that the cases cited to support them are of the nature or character to which I have above referred, and do not sustain the proposition or prin-

<sup>325</sup> In re Great Britain Steamboat Co., 26 Ch. Div. 616.

ciple that a party to an illegal contract, capable of execution by the acts of the parties, and in which he is in *pari delicto*, can, after part performance and execution, on a refusal by him to fulfill and perform what remains to be done, revoke and nullify what has been actually performed, and from which he sought or expected to derive benefit and advantage, and in fact may have done so, and claim a restoration or compensation therefor from the other party, on the pretext or ground that he has become repentant of his conduct at the particular time when he is required, by the terms of his contract, to do some further act which most probably his interest, or want of means, or apprehension of loss from its further prosecution induces him to repudiate. A mere refusal or neglect to fulfill is not *per se* evidence of repentance, nor does it raise a presumption that an entire fulfillment of a contract in violation of a law or of public policy, deliberately entered into and partially executed, is withheld or refused by a respect and regard for law and the public welfare." <sup>826</sup>

*Par Delictum.*

If the party asking to be relieved from the effect of an illegal agreement was induced to enter into the agreement by means of fraud, he is not always regarded as being in *pari delicto* with the other party, and the court may relieve him. As illustrating this rule is a case in which a party sued in equity to set aside a conveyance made in pursuance of an agreement which was illegal on the ground of champerty. It was urged that the parties were in *pari delicto*, but the court, being satisfied that the plaintiff had been induced to enter into the agreement by the fraud of the defendant, held that he was entitled to relief. "Where the parties," it was said, "to a contract against public policy, or illegal, are not in *pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him." <sup>827</sup>

<sup>826</sup> Knowlton v. Congress Spring Co., 57 N. Y. 518, Dwight, C., dissenting. And see, contra, Knowlton v. Congress Spring Co., 103 U. S. 49.

<sup>827</sup> Reynell v. Sprye, 1 De Gex, M. & G. 600; Ford v. Harrington, 16 N. Y. 285; Roman v. Mall, 42 Md. 513; Green v. Corrigan, 87 Mo. 359; Davidson v. Carter, 55 Iowa, 117, 7 N. W. Rep. 466; Barnes v. Brown, 32 Mich.

Another class of cases in which the parties to an illegal agreement are not regarded as being in *pari delicto* is where one of them was induced to enter into the agreement under the influence of duress or strong pressure.<sup>328</sup> "This is not a case of *par delictum*," it was said by an English judge in reference to a case of duress. "It is oppression on one side and submission on the other. It never can be predicated as *par delictum*, when one holds the rod and the other bows to it."<sup>329</sup> In a case, for instance, where a debtor sued to recover an additional sum, paid by him to one of his creditors, in fraud of the others, to induce the former to agree to a composition, he was allowed to recover, it being shown that the decision of several other creditors depended on the defendant's acceptance or rejection of the offer of a composition. "It is said that the parties are in *pari delicto*," said the court. "It is true that both are in *delicto*, because the act is a fraud upon the other creditors; but it is not *par delictum*, because the one has power to dictate, the other no alternative but to submit."<sup>330</sup>

146; *Belding v. Smythe*, 138 Mass. 530. So in a late case in the New York court of appeals, reversing the New York common pleas, it was held that money paid to a marriage broker may be recovered by the party who paid it, as obtained by constructive fraud; and that she will not be regarded as in *pari delicto* with him. *Duval v. Wellman*, 124 N. Y. 156, 28 N. E. Rep. 343, reversing 1 N. Y. Supp. 70.

<sup>328</sup> *Reynell v. Sprye*, *supra*; *Baehr v. Wolf*, 59 Ill. 470; *Atkinson v. Denby*, 6 Hurl. & N. 778, 7 Hurl. & N. 934; *Richardson v. Crandall*, 48 N. Y. 348; *Tracy v. Talmage*, 14 N. Y. 162; *Foley v. Greene*, 14 R. I. 618; *Green v. Corrigan*, 87 Mo. 359; *Brooks v. Martin*, 2 Wall. 70; *Roman v. Mall*, 42 Md. 313; *Curtis v. Leavitt*, 15 N. Y. 9; *Mount v. Waite*, 7 Johns. (N. Y.) 434; *Knowlton v. Congress Spring Co.*, 57 N. Y. 532; *White v. Bank*, 22 Pick. (Mass.) 181. Though a mortgage given by a father to prevent the prosecution of his son for a crime is illegal, he may sue to set it aside. Having executed it under strong pressure, he is not in *pari delicto* with the mortgagee. *Foley v. Greene*, *supra*. So, also, an old woman, who has been unduly influenced by her son-in-law, a defaulter, and the sureties on his bond, to execute to the sureties a mortgage to indemnify them for the defalcation, is entitled to relief against the mortgage, though she executed it to shield the son-in-law from punishment. *Bell v. Campbell* (Mo. Sup.) 25 S. W. Rep. 359.

<sup>329</sup> *Smith v. Cuff*, 6 Maule & S. 160, at page 165.

<sup>330</sup> *Atkinson v. Denby*, *supra*; *Solinger v. Earle*, 82 N. Y. 393; *Crossley v. Moore*, 40 N. J. Law, 27.

It is also held that the parties are not to be regarded as being in *pari delicto* where the agreement is merely *malum prohibitum*, and the law which makes it illegal was intended for the protection of the party asking relief.<sup>331</sup> As illustrating this rule are cases in which banks or other corporations are prohibited under penalties from issuing bills or other securities, but no penalty is imposed on persons who receive the illegal securities. In such cases it is held that the law creating the illegality is to protect the public against the prohibited securities, that the corporation issuing them is the only offender, and that persons who receive them may recover the money paid for them. They are not in *pari delicto*. "The corporation issuing the bills contrary to law and against penal sanctions is deemed more guilty than the members of the community who receive them, whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and, if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them."<sup>332</sup>

*Rights of Factors, Brokers, and Other Agents.*

There are some English cases to which Sir William Anson has called attention, the purport of which, as he construes them, seems to be that, where a person employs another to make a void, or even

<sup>331</sup> *Barclay v. Pearson* [1893] 2 Ch. 154; *Bowditch v. Insurance Co.*, 141 Mass. 292, 4 N. E. Rep. 798. In the former case it was held that persons buying chances in a lottery are intended to be protected by the statute prohibiting lotteries, and are not in *pari delicto*, so as to be precluded from recovering what they have paid. In the latter case it was held that a statute providing that "no member of a committee or officer of a domestic insurance company, who is charged with the duty of investing its funds, shall borrow the same," was intended to protect the company and policy holders from the dishonesty or self-interest of the officers, and did not render a loan to an officer illegal, so as to prevent the company from recovering on his promise to repay. And see *Bateman v. Robinson*, 12 Neb. 508, 11 N. W. Rep. 736; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Atlas Bank v. Bank*, 3 Metc. (Mass.) 581; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442; *Browning v. Morris*, 2 Cowp. 790; *Smith v. Bromley*, 2 Doug. 696.

<sup>332</sup> *Thomas v. City of Richmond*, 12 Wall. 349; *Oneida Bank v. Bank*, 21 N. Y. 400; *Smith v. Bromley*, 2 Doug. 696.

an illegal, contract, and the latter, having made it, would be subject to loss if he did not fulfill its terms, the person so employing him must enable him to fulfill those terms, or to indemnify him for having fulfilled them. In one case a betting commissioner had been employed to make bets, the nonpayment of which would cause him to be turned out of Tattersall's, and it was held that the employer could not revoke the employment after the bets were lost, and before they were paid, but was bound to indemnify the person employed against payments made under this compulsion.<sup>333</sup> In another case, where an investor had employed a broker to purchase shares for him according to the rules and practice of the stock exchange, and it was a rule of the stock exchange to enforce among its members, under penalty of expulsion, the fulfillment of contracts made in violation of a statute avoiding contracts for the sale of bank shares made without specifying their number, and making it a misdemeanor on the part of the broker to effect such a contract, it was held that the investor, having had knowledge of the custom, was liable to indemnify the broker for payments made in fulfillment of the contract.<sup>334</sup> The result of these decisions in England, says Anson, is that the employment of a man who finds it profitable to belong to a society which enforces invalid or illegal contracts will make such contracts enforceable, since the employer cannot revoke, and must indemnify.

If these cases have been correctly construed, it is safe to say that the great weight of authority is to the contrary in this country.<sup>335</sup> If a broker or other agent is employed to carry out an illegal transaction, and is privy to the unlawful design, and by virtue of his employment performs services, makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal.<sup>336</sup> Not

<sup>333</sup> *Read v. Anderson*, 13 Q. B. Div. (Court of Appeal) 779.

<sup>334</sup> *Seymour v. Bridge*, 14 Q. B. Div. 460.

<sup>335</sup> These are exceptional cases, and it seems that they do not warrant so broad a construction as Anson gives them. It is believed that the decisions will show that the law in respect to the rights of factors, brokers, and other agents employed in illegal transactions is substantially the same in England as it is with us. See *Greenh. Pub. Pol.* 110, and cases cited.

<sup>336</sup> *Greenh. Pub. Pol.* 110 (collecting the cases); *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. Rep. 49; *Foss v. Cummings*, 47 Ill. App. 665; *Id.* (Ill. Sup.) 36 N. E. Rep. 553; *Embrey v. Jenkinson*, 131 U. S. 336, 9 Sup. Ct. Rep. 776; *Irwin*



only is this true, but it has been held that any express promise made by the principal to reimburse him is void.<sup>327</sup> This, of course, does not apply where a broker is employed to make contracts the illegality of which depends on the intention of his principal, and the broker is not aware of such intent; as, for instance, where a stock or grain broker is employed to sell stock or grain on the exchange for future delivery, and he is not aware of the fact that his principal intends, not an actual sale and delivery, but a mere gambling on the rise and fall of prices.<sup>328</sup>

### CONFLICT OF LAWS.

**214. IN SPACE.**—A contract which is valid where it is made and is to be performed is valid everywhere, except  
**EXCEPTIONS**—Where to enforce it would be injurious to the interests of the state or country where it is sought to be enforced, or to the interests of its citizens, as

v. Williar, 110 U. S. 499, 4 Sup. Ct. Rep. 160; Kirkpatrick v. Adams, 20 Fed. Rep. 287; Gibbs v. Gas. Co., 130 U. S. 396, 9 Sup. Ct. Rep. 553; Hooker v. Knab, 26 Wis. 511; Gregory v. Wendell, 39 Mich. 337; Mohr v. Miesen, 47 Mich. 228, 49 N. W. Rep. 862; Fareira v. Gabell, 89 Pa. St. 89; Cunningham v. Bank, 71 Ga. 400; Stewart v. Schall, 65 Md. 308, 4 Atl. Rep. 390; Everingham v. Meighan, 55 Wis. 354, 13 N. W. Rep. 269; Whitesides v. Hunt, 97 Ind. 191; Calderwood v. McCrea, 11 Bradw. (Ill.) 543; Connor v. Black (Mo. Sup.) 24 S. W. Rep. 184; Hill v. Johnson, 38 Mo. App. 383; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. Rep. 203; Samuels v. Oliver, 130 Ill. 73, 22 N. E. Rep. 490. In England, dealing in futures is not regarded as illegal, but merely void under the statute against gaming and wagering transactions, and a broker is there entitled to indemnity against liabilities incurred by him in executing the orders of his principal. Thacker v. Hardy, 4 Q. B. Div. 685.

<sup>327</sup> Everingham v. Meighan, *supra*; Embrey v. Jemison, *supra*; Kahn v. Walton, *supra*.

<sup>328</sup> Rountree v. Smith, 108 U. S. 269, 2 Sup. Ct. Rep. 630; Edwards v. Hoeflinghoff, 38 Fed. Rep. 635; Lehman v. Feld, 37 Fed. Rep. 852; Boyd v. Hanson, 41 Fed. Rep. 174; Pape v. Wright, 116 Ind. 502, 19 N. E. Rep. 459; Mohr v. Miesen, 47 Mich. 228, 49 N. W. Rep. 862. A mere expectation on the part of the principal and broker, in sales for future delivery, that purchasers from the principal may be willing to adjust the transactions by paying or receiving differences, when there is no agreement to that effect, does not render the contract illegal. Barnes v. Smith (Mass.) 34 N. E. Rep. 403; *ante*, p. 410.

- (1) Where it is in evasion of the laws of such state or country, or
- (2) Where it is opposed to its policy or institutions, or
- (3) Where it is against good morals, religion, or public rights.

**215. An agreement which is invalid where it is made is invalid everywhere, except that**

**EXCEPTION**—A country or state, it has been said, does not, as a rule, recognize or enforce the revenue laws of a foreign country or state. As to this, however, there is serious doubt.

**216. IN TIME.**—An agreement which is illegal when made is not rendered valid by subsequent legislation. On the other hand a change in the law cannot render illegal an agreement which was legal when made, though it may render further performance impossible, and operate as a discharge.

As a general rule, subject to exceptions which we will notice briefly, the legality of a contract is to be determined by the law of the place where it is made and is to be performed. If it is valid there it is valid everywhere. "This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law."<sup>329</sup> A sale of goods, for instance, made and completed by

<sup>329</sup> *Pearsall v. Dwight*, 2 Mass., at page 89. And see *Andrews v. Herriot*, 4 Cow. (N. Y.) 508, note (where the earlier cases are collected); *Ward v. Vosburgh*, 31 Fed. Rep. 12; *Brown v. Finance Co.*, Id. 516; *Sullivan v. Sullivan*, 70 Mich. 583, 38 N. W. Rep. 472; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. Rep. 916; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. Rep. 713; *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. Rep. 141; *Appeal of Fowler*, 125 Pa. St. 388, 17 Atl. Rep. 431; *Atlantic Phosphate Co. v. Ely*, 82 Ga. 438, 9 S. E. Rep. 170; *Fairchild v. Railroad Co.* (Pa. Sup.) 24 Atl. Rep. 79. A note executed in one state, and free from usury under its laws, is valid in another state, though, if made in the latter state, it would have been usurious. *Brown v. Finance Co.*, supra; *Mathews v. Paine*, 47 Ark. 54, 14 S. W. Rep. 463; *Van Vleet v. Sledge*, 45 Fed. Rep. 743; *Mott*

delivery in one state, where it is valid, will be enforced in another state, though it would have been invalid if made in the latter state.<sup>340</sup> A marriage, also, though strictly not a contract, is governed by the same principle. If valid where it is executed, it is valid everywhere.<sup>341</sup> On the other hand, a contract which is invalid where it is made and is to be performed is invalid everywhere. A note, for instance, which is void for usury in the state where it is executed, is void in another state, though, if made in the latter, it would have been valid.<sup>342</sup>

The rule that a contract which is valid where it is made and is to be performed is valid everywhere is subject to exceptions. In the first place, no state is bound to recognize and enforce a contract which is injurious to its own interests, or to the interests of

v. Rowland, 85 Mich. 561, 48 N. W. Rep. 638; *Staples v. Nott*, 128 N. Y. 408, 28 N. E. Rep. 515; *Buchanan v. Bank*, 55 Fed. Rep. 223. Note on gaming consideration, valid where it was made and the transaction took place, is enforceable in a state under whose laws it would have been void. *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. Rep. 687. But see *Savings Bank v. Bank*, 38 Fed. Rep. 800. Dealings in futures. *Ward v. Vosburgh*, 31 Fed. Rep. 12; *Lehman v. Feld*, 37 Fed. Rep. 852. Sunday contract. *McKee v. Jones*, 67 Miss. 405, 7 South. Rep. 348; *Arbuckle v. Reaume* (Mich.) 55 N. W. Rep. 808; *Adams v. Gay*, 19 Vt. 358; *Swann v. Swann*, 21 Fed. Rep. 299; *Brown v. Browning*, 15 R. I. 422, 7 Atl. Rep. 403; *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N. W. Rep. 531. Contract in consideration of dismissal of criminal prosecution valid where made. *Harrison v. Baldwin*, 5 Ohio Cir. Ct. 310.

<sup>340</sup> *Greenwood v. Curtis*, 6 Mass. 377; *Grant v. McLachlin*, 4 Johns. (N. Y.) 34; *O'Regan v. Steamship Co.*, 160 Mass. 356, 35 N. E. Rep. 1070; *Braun v. Keally*, 146 Pa. St. 519, 23 Atl. Rep. 389; *Brinker v. Scheunemann*, 43 Ill. App. 656; *Dumme v. Flint*, 64 Vt. 533, 24 Atl. Rep. 1051; *Clafin v. Meyer*, 41 La. Ann. 1048, 7 South. Rep. 139; *Kerwin v. Doran*, 29 Mo. App. 397; *Wagner v. Breed*, 29 Neb. 720, 46 N. W. Rep. 286.

<sup>341</sup> *Com. v. Lane*, 113 Mass. 458; *Sutton v. Warren*, 10 Metc. (Mass.) 451; *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395; *Ilderton v. Ilderton*, 2 H. Bl. 145; *Inhabitants v. Inhabitants*, 1 Pick. (Mass.) 507; *Medway v. Needham*, 16 Mass. 157.

<sup>342</sup> *Van Schaick v. Edwards*, 2 Johns. Cas. (N. Y.) 355; *Mathews v. Paine*, 47 Ark. 54, 14 S. W. Rep. 463; *Meroney v. Association*, 112 N. C. 842, 17 S. E. Rep. 637. Note void for gaming in France, where it is made, is void in England. *Robinson v. Bland*, 2 Burrows, 1077. And see, for other cases, *Touro v. Cassin*, 1 Nott & McC. (S. C.) 173. Sale made in another state in violation of its liquor laws. *Tredway v. Riley*, 32 Neb. 495, 49 N. W. Rep. 268.

its citizens. "This exception results from the consideration that the authority of the acts and contract done in other states, as well as the laws by which they are regulated, are not, *proprio vigore*, of any efficacy beyond the territories of that state; and whatever effect is attributed to them elsewhere is from comity, and not of strict right. And every independent community will and ought to judge for itself how far that comity ought to extend. The reasonable limitation is that it shall not suffer prejudice by its comity. \* \* \* Contracts, therefore, which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; contracts against good morals, or against religion, or against public rights; and contracts opposed to the national policy or national institutions,—are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made."<sup>343</sup> To illustrate this exception, a contract made in one country to smuggle goods into another in violation of its laws will not be enforced in the latter country.<sup>344</sup> So also a sale of intoxicating liquors or other goods in one state, though the sale is there valid, will not be enforced in another state, where the intention of both

<sup>343</sup> Story, *Conf. Law*, § 244; *Greenwood v. Curtis*, 6 Mass. 378; *Davis v. Bronson*, 6 Iowa, 410; *Kentucky v. Bassford*, 6 Hill (N. Y.) 526; *Territt v. Bartlett*, 21 Vt. 189; *Blanchard v. Russell*, 13 Mass. 6; *In re Dalpay*, 41 Minn. 532, 43 N. W. Rep. 564; *Savings Bank v. Bank*, 38 Fed. Rep. 800; *Kilcrease v. Johnson*, 85 Ga. 600, 11 S. E. Rep. 870; *Armstrong v. Best*, 112 N. C. 59, 17 S. E. Rep. 14. It has been held, for instance, that a contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country, even though it may not be invalid according to the laws and customs of the foreign country. The courts will refuse to enforce such a contract, "not from any consideration of the interests of that government, or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people." *Oscanayan v. Arms Co.*, 103 U. S. 261. Though this case is not directly in point, it illustrates what we have said in the text.

<sup>344</sup> *Armstrong v. Toler*, 11 Wheat. 258; *Holman v. Johnson*, Cowp. 341. See, also, ante, p. 481, and cases there cited. Mere knowledge on the part of the seller that the buyer has such an unlawful intention, without participation therein, nor assistance, does not render the sale illegal as against him so as to prevent him from recovering the price. *Holman v. Johnson*, supra; ante, p. 482, and cases there cited.

parties was to import the goods into the latter state, and sell them in violation of its laws.<sup>345</sup> Another exception to the rule that contracts which are valid where made are valid everywhere is in the case of contracts which are contrary to good morals, to religion, or public rights, as in the case of "contracts made in a foreign country for future illicit cohabitation and prostitution;<sup>346</sup> contracts for the printing or circulation of irreligious publications; contracts to promote or reward the commission of crimes; contracts to corrupt or evade the due administration of justice; contracts to cheat public agents, or to defeat public rights; and in short all contracts which, in their own nature, are founded in moral turpitude, and are inconsistent with the good order and solid interests of society."<sup>347</sup> Another exception is in the case of contracts which are opposed to the national policy and institutions of the state or country where they are sought to be enforced.<sup>348</sup>

An exception to the rule that contracts which are invalid where they are made are invalid everywhere is in the case of contracts violating the revenue laws. It seems to have been an established doctrine of the common law that a nation will not recognize or enforce the revenue laws of another country, and that the contracts of its own subjects, made to evade or defraud the revenue laws of foreign nations, may be enforced in its own courts.<sup>349</sup> This doctrine has been deprecated by eminent judges and lawyers, and the later cases have shown a tendency to hold the contrary.<sup>350</sup>

<sup>345</sup> *Alken v. Blaisdell*, 41 Vt. 655; *Banchor v. Mansel*, 47 Me. 58; *Webster v. Munger*, 8 Gray (Mass.) 584; *Davis v. Bronson*, 6 Iowa. 410.

<sup>346</sup> *Walker v. Perkins*, 3 Burrows, 1568; *Jones v. Randall*, Cowp. 37; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) at page 228; *Robinson v. Bland*, 2 Burrows, 1084.

<sup>347</sup> Story, Conf. Law, § 258, and cases cited.

<sup>348</sup> Story, Conf. Law, § 259, and illustrations mentioned. *Monroe v. The Iowa*, 50 Fed. Rep. 561.

<sup>349</sup> Story, Conf. Law, §§ 245, 256, 257; *Boucher v. Lawson*, Cas. t. Hardw. 84, 80, 191; *Holman v. Johnson*, Cowp. 341; *Ludlow v. Van Rensselaer*, 1 Johns. (N. Y.) 94.

<sup>350</sup> Story, Conf. Law, §§ 245, 256, 257. Thus it has been held in a late Massachusetts case that a sale of intoxicating liquors in Massachusetts, with a view of their being resold in another state, contrary to the laws of the latter, is invalid in Massachusetts. *Graves v. Johnson*, 156 Mass. 211, 30 N. E. Rep. 818. And see *Tredway v. Riley*, 32 Neb. 495, 49 N. W. Rep. 268.

The rule stated at the beginning of this paragraph only applies, it will be noticed, where the contract is to be performed where it is made. Where it is either expressly or by implication to be performed at some other place, "there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, \* \* \* is to be governed by the law of the place of performance."<sup>351</sup>

*Change of Law.*

An agreement which is illegal and void at the time of its inception cannot be rendered valid by subsequent legislation;<sup>352</sup> nor, on the other hand, can a change of the law render invalid a contract which was valid when made.<sup>353</sup> Where, however, performance of a contract lawful in its inception is made unlawful by any subsequent legislation or event, the contract is thereby dissolved, unless the statute, to have this effect, would be unconstitutional, as impairing the obligation of contract.

<sup>351</sup> Story, Conf. Law, § 280; *Andrews v. Pond*, 13 Pet. 65; *Frazier v. Warfield*, 9 Smedes & M. (Miss.) 220; *Thayer v. Elliott*, 16 N. H. 104; *First Nat. Bank v. Hall* (Pa. Sup.) 24 Atl. Rep. 665. That a note is governed by the law of the place where it is payable, see *Stevens v. Gregg* (Ky.) 12 S. W. Rep. 775; *Tenant v. Tenant*, 110 Pa. St. 478, 1 Atl. Rep. 532; *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. Rep. 530; *Bigelow v. Burnham* (Iowa) 49 N. W. Rep. 104. But see *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163, 9 South. Rep. 143; *Kilcrease v. Johnson*, 85 Ga. 600, 11 S. E. Rep. 870; *New England Mortg. Co. v. McLaughlin*, 87 Ga. 1, 13 S. E. Rep. 81; *Mott v. Rowland*, 85 Mich. 561, 48 N. W. Rep. 638; *Arbuckle v. Reaume* (Mich.) 55 N. W. Rep. 808.

<sup>352</sup> *Handy v. Publishing Co.*, 41 Minn. 188, 42 N. W. Rep. 872; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. Rep. 767; *Mays v. Williams*, 27 Ala. 267. Repeal of law does not validate prior invalid contract. *Hathaway v. Moran*, 44 Me. 67; *Hughes v. Boone*, 102 N. C. 187, 9 S. E. Rep. 286; *Robinson v. Barrows*, 48 Me. 186; *Bancher v. Mansel*, 47 Me. 58; *Webber v. Howe*, 36 Mich. 150; *Anding v. Levy*, 57 Miss. 51; *Gilliland v. Phillips*, 1 S. C. 152; *Bailey v. Mogg*, 4 Denio (N. Y.) 60.

<sup>353</sup> *Boyce v. Tabb*, 18 Wall. 546; *Jump v. Johnson* (Ky.) 13 S. W. Rep. 843; *Richardson v. Campbell*, 34 Neb. 181, 51 N. W. Rep. 753; *Knight v. Lee* [1893] 1 Q. B. 41.

## CHAPTER IX.

### OPERATION OF CONTRACT.

- 217. Limits of Contractual Relation—In General.
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- 239. Contracts both Joint and Several.
- 240. Contribution between Joint Debtors.

Thus far we have endeavored to show what is necessary to the formation and existence of a valid contract. Having ascertained this, we must next consider its effect when formed. In doing so we will first ascertain to whom the obligation of a contract extends, or who have rights or liabilities under it. Then we shall ascertain the extent to which the rights and liabilities may be assigned or pass to others than the original parties. After that we will consider the operation and effect of a contract having several parties on one or both sides.

### LIMITS OF CONTRACTUAL RELATION—IN GENERAL.

217. As a general rule, subject to exceptions to be hereafter noticed, a contract does not impose liabilities nor confer rights on a person who is not a party to it.

**EXCEPTIONS**—(a) There are apparent exceptions to this rule:

- (1) Where one person represents another in entering into a contract; that is, in the case of contracts through agents.

(2) Where the rights or liabilities created by a contract pass to a person or persons other than the original parties by assignment, either by act of the parties or by operation of law.

(b) There are also real exceptions to the rule in some jurisdictions, but of these we shall treat separately.

Subject to exceptions which we shall presently explain, it is a general rule, not only established by the decided cases, but flowing from the very nature of contract as a legal conception, that a person who is not a party to a contract cannot be included in the rights or liabilities which it creates, so as to entitle him to sue, or render him liable to be sued, upon it. As we have seen, a true contract is an agreement between two or more persons, by which an obligation or legal tie is created, binding those persons together, so that one or each has the right to require some act or forbearance on the part of the other. As a rule, the legal relations of third persons are not affected, because they are not parties to the agreement. They are not bound by the legal bond which it creates, and a breach thereof cannot give them any rights. Nor, on the other hand, can any liabilities be imposed upon them. One of the chief characteristics of the contractual as opposed to other forms of obligation consists in the fact that the restraint which it imposes on individual freedom is voluntarily created by those who are subject to it. In other words, it is the creature of agreement.

It will be noticed that the rule stated in the black-letter text is divisible. There are in fact two rules,—the first, that a contract cannot impose liabilities, and the second, that it cannot confer rights, on a person who is not a party to it. We can better reach a correct understanding of the law on this subject if we consider each of these rules separately, together with the exceptions, or apparent exceptions, peculiar to it; but before doing so we must notice two apparent exceptions to the rule as a whole.

*Apparent Exceptions to the Rule—Agency.*

Although one person cannot, by contract with another, impose liabilities, nor, as a rule, confer rights, on a third person not a party



to the contract, one person may represent another, as being employed by him, for the purpose of bringing him into contractual relations with a third. Employment for this purpose is called "agency," the employer being called the "principal" and the employed his "agent." The acts of the agent in making contracts are done on behalf, and generally, though not necessarily, in the name, of his principal. The principal really becomes a party to the contract made for him by his agent. A contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification by the principal, and this authority or ratification is nothing else than the assent of the principal to be bound. The contract which binds him is his own contract. After all, therefore, this is only an apparent exception to the rule that persons not parties to a contract are not bound or given rights thereby.

The subject of agency will be dealt with at length in a subsequent chapter.

*Same—Assignment of Contracts.*

The other exception mentioned in the black-letter text, namely, that under some circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, by act of the parties, or by operation of law, is also only an apparent exception. The obligation binds only the parties to the agreement, but these parties, having created the obligation which binds them to one another, may in certain ways, and under certain circumstances, be replaced by others who assume their rights or liabilities under the contract. Thus, to illustrate, if John Doe contracts with Richard Roe, their contract cannot impose liabilities or confer rights upon John Styles. There are circumstances, however, under which John Doe or Richard Roe may substitute John Styles for himself as a party to the contract, and there are circumstances under which the law would operate to effect this substitution. John Styles thus becomes a party to the contract. This substitution is called assignment of the contract. We will presently explain it at some length. Before doing so we will take up in turn, and explain, each subdivision of the general rule mentioned in the black-letter text, and show the exceptions to which it is subject.

**SAME—IMPOSING LIABILITY ON THIRD PERSONS.**

218. A contract cannot impose liabilities on a person who is not a party to it.

219. A contract, however, between master and servant at least, imposes a duty on third persons not to interfere with its performance by inducing the servant to break it, and for a violation of this duty an action will lie. Many courts hold that the doctrine applies to all other contracts as well.

The proposition that a man cannot incur liabilities from a contract to which he was not a party is a part of a wider rule that liability *ex contractu* or *quasi ex contractu* cannot be imposed upon a man otherwise than by his act or consent. A person cannot, by paying another's debts unasked, make such other his debtor. "A man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor."<sup>1</sup> Two persons cannot, by any contract into which they may enter, thereby impose liabilities upon a third person.<sup>2</sup> Where a person, for instance, contracts with another to perform services for him, or to sell him goods, he may, under some circumstances, procure the services to be rendered or the goods delivered by a third person, and thus perform his contract; but he cannot, by any such agreement with a third person, confer upon the latter the right to require payment of the other party. Nor will the law create a contract between the latter and such third person because of the acceptance of the services or goods, where there was no intention to enter into legal relations with the third person.<sup>3</sup>

It is not believed that there is any real exception to this rule. It is, of course, subject to the apparent exceptions in cases of agency and assignment mentioned above.

<sup>1</sup> *Durnford v. Messiter*, 5 Maule & S. 446; *Hearn v. Cullin*, 54 Md. 533.

<sup>2</sup> *Rossman v. Townsend*, 17 Wis. 98; *Bolles v. Carll*, 12 Minn. 113 (Gil. 62).

<sup>3</sup> *Schmalling v. Thomlinson*, 6 Taunt. 147; *Boston Ice Co. v. Potter*, 123 Mass. 28; post, p. 513.

*Contract may Impose Duty on Third Parties.*

Though a contract cannot impose the burdens of an obligation upon one who was not a party to it, it may and does impose a duty upon persons extraneous to the obligation not to interfere with its due performance. Where a person induced a singer to break her contract with the manager of an opera house, and was sued by the manager for procuring the breach, it was argued (1) that an action would lie against one who procured the breach of any kind of contract; and (2) that, if that were not so, an action would lie, at any rate, for inducing a servant to quit the service of his master. The relation of master and servant has always been held to involve a right on the part of the master to sue any one who enticed away his servant, and so the court was called upon to answer two questions: Does an action lie for procuring a breach of any contract? If not, then does the exceptional rule applicable to the contract of master and servant apply to the manager of a theater and the actors whom he engages to perform? The majority of the court answered both questions in the affirmative.<sup>4</sup> The same doctrine has been held by some of our courts.<sup>5</sup> On the other hand, some of our courts have thought that the doctrine does not apply to other contracts than the contract between master and servant.<sup>6</sup> As to this contract there is probably no conflict at all.<sup>7</sup>

<sup>4</sup> Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. Div. 339.

<sup>5</sup> Walker v. Cronin, 107 Mass. 555; Jones v. Stanly, 76 N. C. 335; Lucke v. Clothing Cutters, 77 Md. 396, 26 Atl. Rep. 505; Jones v. Blocker, 43 Ga. 331; Chipley v. Atkinson, 23 Fla. 206, 1 South. Rep. 934; Haskins v. Royster, 70 N. C. 601. And see Ensor v. Bolgiano, 67 Md. 190, 9 Atl. Rep. 529; Dudley v. Briggs, 141 Mass. 582, 6 N. E. Rep. 717; Burgess v. Carpenter, 2 S. C. 7.

<sup>6</sup> Chambers v. Baldwin, 91 Ky. 121, 15 S. W. Rep. 57; Ashley v. Dixon, 48 N. Y. 430; Heywood v. Tillson, 75 Me. 225. All the courts probably agree, however, that an action will lie by a party to a contract against a third person for fraudulent representations by the latter, inducing the other party to the contract to break it. Rice v. Manley, 66 N. Y. 82; Benton v. Pratt, 2 Wend. (N. Y.) 385; Ashley v. Dixon, 48 N. Y. 430.

<sup>7</sup> Bixby v. Dunlap, 56 N. H. 456; Noice v. Brown, 39 N. J. Law, 569; Heywood v. Tillson, 75 Me. 225; Woodward v. Washburn, 3 Denio (N. Y.) 369; Walker v. Cronin, 107 Mass. 555; Ames v. Railway Co., 117 Mass. 541; Haskins v. Royster, 70 N. C. 601; Jones v. Blocker, 43 Ga. 331; Daniel v. Swarengen, 6 S. C. 207; Huff v. Watkins, 15 S. C. 82.

**SAME—CONFERRING RIGHTS ON THIRD PERSONS.**

**220.** As a rule, a contract cannot confer rights on a person who is not a party to it so as to entitle him to sue in his own name for its breach.

**221. EXCEPTIONS—**(a) The rule is subject to apparent exceptions as follows:

(1) If the contract is such as to constitute the promisor trustee for the benefit of the third person, the latter may sue in equity.

(2) Where money or other property has come into the promisor's hands by virtue of the contract, for the use of the third person, the law will create a contract between him and such third person, on which the latter may sue.

(b) In many of the states an exception is made in case of a promise made for the benefit of a third person, and the latter is allowed to sue thereon. It seems, however, that there must be such a relation between the promisee and the person for whose benefit the promise is made as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the former to the latter.

(c) In many states there are statutes allowing or requiring actions to be brought in the name of "the real party in interest."

This rule, in its general application, is recognized by all courts. It is settled, for instance, that where a bilateral contract is made, and there is no question of agency, nor an assignment of the contract, a third person cannot perform for one of the parties, and himself claim performance by the other. He cannot thus acquire rights under the contract, even by agreement with the party whose promise he performs, unless the contract, as will be presently explained,

is assignable, and is assigned. This is, in effect, another way of looking at the rule which we have already considered,—that a contract cannot impose liabilities on a person not a party to it. If a third person cannot acquire such rights by agreement with the party whose promise he performs, he certainly cannot do so in the absence of such an agreement, and it makes no difference that he acts in good faith. His good faith cannot supply the necessary consent of the party he seeks to hold.

In a leading English case, shippers had employed a firm of brokers to transport a quantity of cocoa for them, and the brokers got a third person to do it. It was held that the latter could not sue the shippers for his expenses and commission, inasmuch as there was no privity of contract between him and them. It was said that the brokers were employed by the shippers to do the whole work for them; that the shippers looked to the brokers for the performance of the work, and the brokers had a right to look to them for payment, and that no one else had that right.\* This case illustrates both of the rules which we are considering. The contract between the brokers and the third person could not impose a liability on the shippers, as they were not parties to it; nor could the contract between the shippers and the brokers confer any rights upon the third person, since he was not a party to it.

In a leading Massachusetts case the defendant had contracted with a company for the continuous delivery of ice by the latter. The company afterwards sold out to the plaintiff, and the plaintiff continued to deliver ice to the defendant without notifying him of the change. It was held that the plaintiff could not recover for the ice so furnished by it, since there was no privity of contract between it and the defendant. "A party," it was said, "has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he

\* *Schmaling v. Thomlinson*, 6 Taunt. 147.

may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into.”<sup>9</sup>

Thus far the rule is clear and is not controverted.<sup>10</sup> A difficulty, and considerable difference of opinion, arises, however, where the contract consists of a promise expressly made by one of the parties for the benefit of a third person; as, where one of the parties, for a consideration moving from the other, promises him to pay money to, or perform services for, a stranger to the contract. We have already, to some extent, considered this question in treating of consideration, but must now go into it at greater length, even though we may have to repeat. There may be said to be three different doctrines on this point; and probably there are more. For convenience we will call them the English,<sup>11</sup> the Massachusetts, and the New York doctrines, and will treat them separately.

*Promise for Benefit of Third Person—The English Doctrine.*

It is contrary to the common sense of mankind that a person should be bound by a contract made between two other persons; but it does not seem so to allow him to derive a benefit from such a contract. If two persons should make a contract in which one promises to do something for a third person, all three might be willing that such third person should have all the rights of an actual contracting party, and should be allowed to sue on the promise. In England, however, it is the established doctrine that the action cannot be maintained. If a person makes a promise to another, the consideration for which is a benefit to be conferred by the promisee on a third person, the contract confers no right on the third person to sue. In a leading English case the defendant had made a promise that, in consideration of the promisee's working for him, he would pay the plaintiff a sum of money, and it was held that the plaintiff could not recover on the promise. The members of the court stated in different forms the same reason for their decision.

<sup>9</sup> *Boston Ice Co. v. Potter*, 123 Mass. 28.

<sup>10</sup> To the effect that a company which has contracted with a city to supply it with water for extinguishing fires is not liable for breach of the contract to a citizen whose property is destroyed because of such breach, see *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. Rep. 604; *Ferris v. Water Co.*, 16 Nev. 44; *Fowler v. Water Co.*, 83 Ga. 219, 9 S. E. Rep. 673.

<sup>11</sup> As to this we will substantially adopt Sir William Anson's statement.

One said that the declaration did not "show any consideration for the promise moving from the plaintiff to defendant;" another, that "no privity is shown between the plaintiff and the defendant;" another, that it was "consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between the promisee and the defendant;" and another, that there was "no promise to the plaintiff alleged."<sup>13</sup>

*Same—Exceptions to the English Doctrine.*

It seems that it was at one time thought in England that, if the person who was to take a benefit under the contract was nearly related by blood to the promisee, a right of action would vest in him;<sup>13</sup> but such a doctrine, if it ever really existed, has been overruled. In a case in which the respective fathers of the parties to a marriage had entered into a contract between themselves only that each should pay a sum of money to the husband, and expressly stipulated that the latter should have power to sue therefor, it was held that an action by him would not lie. "Some of the old decisions," it was said, "appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it if he stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration. The strongest of these cases is that cited in *Bourne v. Mason*,<sup>14</sup> in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."<sup>15</sup>

This doctrine, says Anson, has not been so strictly adhered to in equity as in the courts of common law. The question has frequently arisen in cases where contracts have been made or work done on behalf of a company which has not yet come into existence. The

<sup>13</sup> *Price v. Easton*, 4 Barn. & Adol. 433. And see *Tweddle v. Atkinson*, 1 Best & S. 393.

<sup>14</sup> *Dutton v. Poole*, 2 Lev. 210.

<sup>15</sup> 1 Vent. 6.

<sup>16</sup> *Tweddle v. Atkinson*, 1 Best & S. 393.

company, when formed, cannot ratify such transactions, and attempts have been made to bind it by introducing into the articles of association a clause empowering the directors to fulfill the terms of the contract, or to repay those who have given work or advanced money to promote the existence of the company. The common-law courts have held that no right of action accrues to the beneficiary under such a provision. In courts of equity, language has been used, sometimes very explicit, to the effect that, where money is payable to one person for the benefit of another, the latter "can claim under the contract as if it had been with himself,"<sup>16</sup> but the later cases go to show that even in equity a person who was not a party to a contract cannot acquire rights thereunder and sue thereon.<sup>17</sup> The beneficiary of a contract acquires no rights *ex contractu*, even in equity. If the contract is so framed as to make one of the parties trustee for a third person for whose benefit it is made, such third person acquires rights by virtue of the trust. A mere contract, however, between two parties, that one of them shall pay money to a third, does not, as a rule, make that third person a *cestui que trust*. There must be some undertaking by one of the contracting parties to stand to the third person in the relation of trustee to *cestui que trust*.<sup>18</sup>

This is Anson's statement of the doctrine as recognized in the English courts of equity. He states that, unless the promise amounts to a declaration of trust on behalf of the third person, he cannot sue; that his right to sue arises, not out of the contract, but out of

<sup>16</sup> *Touche v. Metropolitan Railway Warehousing Co.*, 6 Ch. App. 671; *Spiller v. Paris Skating Rink*, 7 Ch. Div. 368.

<sup>17</sup> *Eley v. Positive Government Sec. Life Assur. Co.*, 1 Exch. Div. (Ct. App.) 48; *In re Empress Eng. Co.*, 16 Ch. Div. 125.

<sup>18</sup> Two English cases, decided about the same time, are cited by Anson as illustrating this distinction. In one of them it was held that a clause in a contract of partnership which provided for the payment of an annuity, for five years after the determination of the partnership, to the retiring partner or his widow, created a trust in favor of the widow. *Murray v. Flavell*, 25 Ch. Div. 89. On the other hand, where a person had employed the plaintiff in the formation of the defendant company, and afterwards agreed with the company that it should pay the plaintiff for his services, it was held that the agreement gave no right of action to the plaintiff. *In re Rotherham Alum Co.*, 25 Ch. Div. 104.



the fiduciary relation which it creates. It is believed, however, that other exceptions, which we will notice in treating of the Massachusetts doctrine, are also recognized in England.

*Same—Massachusetts Doctrine.*

The English doctrine on this subject is also recognized by the Massachusetts court, and by the courts of some of the other states, though other exceptions than those mentioned by Anson are there recognized. "The general rule of law," it was said by the Massachusetts court, "is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract; and, consequently, that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter."<sup>19</sup>

*Same—Exceptions to the Massachusetts Doctrine.*

There is no doubt but that in this country courts of equity recognize the exception to this rule, mentioned by Anson, in the case of trusts; and that where a contract, consisting of a promise for the benefit of a third person, is so framed as to make the promisor a trustee for such third person, the latter may sue to enforce the trust.<sup>20</sup>

In addition to this, however, there is with us another exception, somewhat similar, recognized by courts of law, as well as of equity, not on the ground that a trust exists, but on the ground that the law creates a contract between the promisor and the third person. This exception is in cases where, under a contract in which a promise is made for the benefit of a third person, assets come to the promisor's hands, or under his control, which in equity belong to the third

<sup>19</sup> *Exchange Bank v. Rice*, 107 Mass. 37; *Rogers v. Stair Co.*, 130 Mass. 58; *Wheeler v. Stewart*, 94 Mich. 445, 54 N. W. Rep. 172; *Linneman v. Moross* (Mich.) 57 N. W. Rep. 103; *Edwards v. Clement*, 81 Mich. 513, 45 N. W. Rep. 1107; *Pipp v. Reynolds*, 20 Mich. 88; *Woodland v. Newhall*, 81 Fed. Rep. 434; *Adams v. Kuehn*, 119 Pa. St. 76, 13 Atl. Rep. 184; *Wilbur v. Wilbur*, 17 R. I. 295, 21 Atl. Rep. 497; *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123.

<sup>20</sup> *Union Pac. R. Co. v. Durant*, 95 U. S. 576; *Chace v. Chapin*, 130 Mass. 128; *Preachers' Aid Soc. v. England*, 106 Ill. 125; *Mory v. Michael*, 18 Md. 227; *Harrisburg Bank v. Tyler*, 3 Watts & S. (Pa.) 373. And see *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517.

person; or, as it has been expressed, "those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors."<sup>21</sup> In such cases it is held that the third person may sue the promisor in his own name. The action is not based on the ground that there is a relation of trustee and cestui que trust between the defendant and the plaintiff, but is based on the contract created by law from the possession of the money or property by the former for the use of the latter.<sup>22</sup> The rights of the third person are not conferred upon him by the contract between the promisor and promisee, but arise out of an independent contract created by law, or quasi contract, between the promisor and the third person.

The exception formerly recognized in England, but since overruled there, to the effect that, if a third person for whose benefit a contract is made is nearly related by blood to the promisee, a right of action on the promise vests in him, has been recognized in this country,<sup>23</sup> but some of the courts have refused to recognize it.<sup>24</sup> Even in Massachusetts, where it has been directly held, the court has since expressed a doubt on the question, even if it has not expressly held the contrary.<sup>25</sup>

<sup>21</sup> *Exchange Bank v. Rice*, 107 Mass. 37.

<sup>22</sup> *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Putnam v. Field*, 103 Mass. 556; *Spencer v. Towles*, 18 Mich. 9; *Grim v. Thomas Iron Co.*, 115 Pa. St. 611, 8 Atl. Rep. 695; *Hosford v. Kanouse*, 45 Mich. 620; *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123; *Hostetter v. Hollinger*, 117 Pa. St. 606, 12 Atl. Rep. 741; *Millen v. Whipple*, 1 Gray (Mass.) 317; *Creager v. Link*, 7 Md. 259; *Kalkman v. McElderry*, 16 Md. 56; *O'Neal v. Board of School Com.*, 27 Md. 227; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. Rep. 427; *Lewis v. Sawyer*, 44 Me. 332; *Keene v. Sage*, 75 Me. 138; *Taylor v. Taylor*, 20 Ill. 650.

<sup>23</sup> *Felton v. Dickinson*, 10 Mass. 287; *Benge v. Hiatt*, 82 Ky. 666.

<sup>24</sup> *Marston v. Bigelow*, 150 Mass. 53, 22 N. E. Rep. 71; *Exchange Bank v. Rice*, 107 Mass. 37; *Wilbur v. Wilbur*, 17 R. I. 295, 21 Atl. Rep. 497; *Linneman v. Moross* (Mich.) 57 N. W. Rep. 103.

<sup>25</sup> *Exchange Bank v. Rice*, *supra*; *Marston v. Bigelow*, *supra*.

*Same—The New York Doctrine.*

In New York, and in most of the other states, the courts have refused to recognize the doctrine that a person for whose benefit a promise is made cannot sue the promisor unless he was a party to the contract. In a leading New York case a debtor of the plaintiff had loaned money to the defendant, and the defendant had promised him to pay the plaintiff. The plaintiff was not a party to the contract, but it was held by four of the seven judges that he could sue on the promise, as it was considered settled in that state that, where a promise is "made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach."<sup>26</sup>

Even in these states, at least according to the New York decisions, there must be something more than a mere promise for the benefit

<sup>26</sup> *Lawrence v. Fox*, 20 N. Y. 268. See, also, *Schermerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 140; *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. Rep. 756; *Burr v. Beers*, 24 N. Y. 178; *Stewart v. Trustees*, 2 Denio (N. Y.) 403; *Reynolds v. Lawton*, 62 Hun, 596, 17 N. Y. Supp. 432; *Cook v. Berrott*, 66 Hun, 633, 21 N. Y. Supp. 358; *Riordan v. First Presbyterian Church*, 3 Misc. Rep. 553, 23 N. Y. Supp. 323; *Id.*, 6 Misc. Rep. 84, 26 N. Y. Supp. 38. And see, to the same effect, *McDowell v. Laev*, 35 Wis. 171; *Bassett v. Hughes*, 43 Wis. 319; *Bristow v. Lane*, 21 Ill. 194; *Harms v. McCormick*, 132 Ill. 104, 22 N. E. Rep. 511; *Mason v. Hall*, 30 Ala. 599; *Brice v. King*, 1 Head (Tenn.) 152; *Allen v. Thomas*, 3 Metc. (Ky.) 198; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. Rep. 427; *Small v. Schaeffer*, 24 Md. 143; *Bohanan v. Pope*, 42 Me. 93; *Wright v. Terry*, 23 Fla. 160, 2 South. Rep. 6; *Crampton v. Ballard*, 10 Vt. 251; *First Nat. Bank v. Schussler* (Ky.) 2 S. W. Rep. 145; *Coleman v. Whitney*, 62 Vt. 123, 20 Atl. Rep. 322; *Kaufman v. Bank*, 31 Neb. 661, 48 N. W. Rep. 738; *Lovejoy v. Howe* (Minn.) 57 N. W. Rep. 57; *Maxfield v. Schwartz*, 43 Minn. 221, 45 N. W. Rep. 429; *Barnes v. Insurance Co.* (Minn.) 57 N. W. Rep. 314; *Barnett v. Pratt* (Neb.) 55 N. W. Rep. 1050; *Schamp v. Meyer*, 20 Neb. 223, 29 N. W. Rep. 379; *Hendrick v. Lindsay*, 93 U. S. 143; *Steene v. Aylesworth*, 18 Conn. 244; *Devol v. McIntosh*, 23 Ind. 529; *Urquhart v. Brayton*, 12 R. I. 169; *Flint v. Cadenasso*, 64 Cal. 83; *Hecht v. Caughron*, 46 Ark. 135; *Treat v. Stanton*, 14 Conn. 445; *Morgan v. Overman Co.*, 87 Cal. 534; *Joslin v. Car Spring Co.*, 36 N. J. Law, 141; *Jones v. Thomas*, 21 Grat. (Va.) 96; *Bellas v. Fogely*, 19 Pa. St. 273; *Brown v. O'Brien*, 1 Rich. Law (S. C.) 268; *Robbins v. Ayres*, 10 Mo. 538. The fact that the person for whose benefit a promise is made is allowed to sue thereon does not prevent the promisee from also suing. *Steene v. Aylesworth*, supra; *Merriam v. Lumber Co.*, 23 Minn. 314. But see *Selgman v. Hoffacker*, 57 Md. 321.

of the third party. There must be between the promisee and the third person seeking to enforce the promise the relation of debtor and creditor, or some such relation as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the promisee to such third person. "It is not sufficient that the performance of the promise may benefit the third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance, and so within the contemplation of the parties; and, in addition, the promisee must have a legal interest that the promise be performed in favor of the party claiming performance."<sup>27</sup>

If the promise, according to some of the decisions, is made primarily for the benefit of the promisee only, though its performance would benefit a third person, the third person, it seems, has no right to sue. "Where a debt already exists from one person to another," it was said by the supreme court of the United States, "a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and, if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue."<sup>28</sup>

*Some—Contracts under Seal.*

In some of the states it is held that the doctrine allowing suit on a contract by a third person for whose benefit it is made applies as well to covenants or promises under seal as to simple contracts.<sup>29</sup>

<sup>27</sup> *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. Rep. 49. And see *Jefferson v. Asch*, 53 Minn. 440, 55 N. W. Rep. 604. ("A stranger to a contract between two others," it was held in the latter case, "in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, cannot recover upon it.") See, also,—as limiting the effect of *Lawrence v. Fox*, supra,—*Lorrillard v. Olyde*, 122 N. Y. 498, 25 N. E. Rep. 917; *Wheat v. Rice*, 97 N. Y. 302; *Clark v. Howard*, 74 Hun, 228, 26 N. Y. Supp. 620; *O'Neill v. Ice Co. (Sup.)* 26 N. Y. Supp. 598.

<sup>28</sup> *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123.

<sup>29</sup> *Bassett v. Hughes*, 43 Wis. 319. And see *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. Rep. 756; *Coster v. City of Albany*, 43 N. Y. 399; *Riordan v.*

In other states the contrary has been held, on the ground that *assumpsit* will not lie on a covenant under seal, and that it is only an action of *assumpsit* that will lie by a person for whose benefit a promise has been made to another.<sup>80</sup>

*Same—Statutory Exceptions.*

By statute, in many of the states,—no doubt in all the code states,—it is expressly provided that every action must be prosecuted in the name of the real party in interest, except in certain cases; and under such a provision the party for whose benefit a contract is made may sue thereon.<sup>81</sup>

*Action by Third Party for Many Joint Contractors.*

If a person and a group of persons, such as an unincorporated society should enter into a contract, it might be convenient that a third person should be able to sue on behalf of the group, and there does not seem to be any good reason why it should not be allowed. The general rule, however, that a contract cannot confer rights on persons not parties to it, applies here, and prevents such a suit. Attempts have often been made to break the rule in these cases, but always without success. To this end, societies which wished to avoid suing in the names of all the members have introduced into their contracts a term to the effect that their rights of action should be vested in a manager or agent; but the courts have not given effect to the provision. In a case in which the managers of an association, under powers of attorney executed by the members, sued upon a contract entered into by the association, it was held that they could not maintain the action, "for the simple reason—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure—that the proper person to bring an action is the person whose right has been violated." "This is an attempt,"

First Presbyterian Church, 26 N. Y. Supp. 38; *Kimball v. Noyes*, 17 Wis. 695; *McDowell v. Laev*, 35 Wis. 171.

<sup>80</sup> *Hinckley v. Fowler*, 15 Me. 285. And see *Harms v. McCormick*, 132 Ill. 104, 22 N. E. Rep. 511 (reversing 30 Ill. App. 125); *Cock v. Varney*, 45 N. J. Eq. 72, 17 Atl. Rep. 108; *Hendrick v. Lindsay*, 93 U. S. 143; *Selgman v. Hoffacker*, 57 Md. 321; *Saunders v. Saunders*, 154 Mass. 337, 28 N. E. Rep. 270; *Millard v. Baldwin*, 3 Gray (Mass.) 484; *Robbins v. Ayres*, 10 Mo. 538.

<sup>81</sup> *Bliss*, Code Pl. § 241.

it was further said, "to do what has been frequently, but fruitlessly, attempted before, viz. to get rid of the difficulty of a large number of people suing in their own names,—to appoint a public officer without obtaining an act of parliament or a charter of incorporation."<sup>22</sup>

In some of the states, statutes have been enacted expressly providing that where the parties are very numerous, and it would be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.<sup>23</sup>

#### ASSIGNMENT OF CONTRACTS—IN GENERAL.

222. Though, as a rule, a contract cannot affect the legal relations of persons not parties to it, other persons may take the place of one or both of the original parties, and so, in a sense, become parties. This substitution is called assignment of the contract. It may be either

- (a) By the voluntary act of the parties, or
- (b) By operation of law.

We have just seen that, subject to certain exceptions, a contract cannot affect any but the parties to it, either by imposing liabilities or conferring rights on them. The original parties to a contract, however, may, under certain circumstances, drop out, and others may take their places. In this way the contractual obligation does pass to persons who were strangers to the contract when originally made, and this would, at first thought, seem to furnish an exception to the rule we have been discussing. The exception, however, is only apparent, for the persons so affected do actually become parties to the contract, either by their own voluntary consent, or by operation of law; and even the law does not so confer rights or impose liabilities, without the consent of the parties, or, at least, without volun-

<sup>22</sup> *Gray v. Pearson*, L. R. 5 C. P. 563.

<sup>23</sup> *Thames v. Jones*, 97 N. C. 121, 1 S. E. Rep. 692; *Gibson v. Trust Co.*, 12 N. Y. Supp. 444; *Gleske v. Anderson*, 77 Cal. 247, 19 Pac. Rep. 421; *Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. Rep. 735; *Alexander v. Gish*, 88 Ky. 13, 9 S. W. Rep. 801; *Lilly v. Tobbein* (Mo. Sup.) 13 S. W. Rep. 1060.

tary acts on their part which prevent their refusing consent. The operation by which this change in the contractual relation is effected is termed an assignment of the contract.

#### **SAME—ASSIGNMENT OF LIABILITIES BY ACT OF PARTIES.**

**223.** A person cannot assign his liabilities under a contract.

**APPARENT EXCEPTIONS**—(a) He may so assign with the consent of the other party to the contract; but this is, in effect, a rescission by agreement, and the substitution of a new contract.

(b) In contracts to do work involving no personal skill or personal qualifications, the party may have the work done by another, but he remains liable if it is not properly done.

(c) When an interest in land is transferred, certain liabilities attaching to the enjoyment of the interest pass with it.

It is the settled rule, subject to exceptions which are apparent rather than real, that a person cannot assign his liabilities under a contract, or, to put the matter from the point of view of the other party to the contract, a person cannot be compelled to accept performance of the contract from a person who was not originally a party to it. The reason for the rule lies not only in the right of a person to know to whom he is to look for the satisfaction of his rights under a contract, but, more particularly, in his right to the benefit which he contemplates from the character, credit, and substance of the person with whom he has contracted.<sup>24</sup>

<sup>24</sup> *Humble v. Hunter*, 12 Q. B. 310; *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 Sup. Ct. Rep. 1308; *Chapin v. Longworth*, 31 Ohio St. 421; *Rappleye v. Seeder Co.*, 79 Iowa, 220, 44 N. W. Rep. 363; *Burger v. Rice*, 3 Ind. 125; *Bethlehem v. Annis*, 40 N. H. 34; *Griswold v. Railroad Co.*, 18 Mo. App. 52; *Lansden v. McCarthy*, 45 Mo. 106; *Palo Pinto Co. v.*

The rule is well illustrated by a case in which a man named Sharpe let a carriage to the defendant, at a yearly rent, for five years, undertaking to paint it every year and keep it in repair. One Robson was, in fact, the partner of Sharpe, but the defendant contracted with Sharpe alone. After three years, Sharpe retired from business, and the defendant was informed that Robson was thenceforth answerable for the repair of the carriage and would receive the rent. The defendant refused to accept the substitution, and it was held that he could not be sued upon the contract. "The defendant," it was said, "may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe. \* \* \* The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone, and not with any other person."<sup>25</sup>

*Exceptions to the Rule.*

The exceptions to this rule are apparent rather than real. As stated in the black-letter text, a person may assign the liabilities imposed upon him by a contract which he has made if the other party to the contract consents. This, however, as we shall see, is, in effect, a new contract. It is a rescission by agreement of the old contract, and the substitution of a new one, in which the same acts are to be performed by different parties.

Another apparent exception is in this, namely: that if a person undertakes to do work for another which requires no special skill, and he has not been selected for the work with reference to any personal qualifications, he may have the work done by some equally competent third person. This, however, is not an assignment of his liabilities, for he does not cease to be liable if the work is not done in accordance with the contract.<sup>26</sup>

The third apparent exception is where an interest in land is trans-

Gano, 60 Tex. 249. And see *Donelson v. Polk*, 64 Md. 501, 2 Atl. Rep. 824; *Stewart v. Railroad Co.*, 102 N. Y. 601, 8 N. E. Rep. 200; post, p. 530, and cases there cited.

<sup>25</sup> *Robson v. Drummond*, 2 Barn. & Adol. 303. But see *British Waggon Co. v. Lea*, 5 Q. B. Div. 149.

<sup>26</sup> *British Waggon Co. v. Lea*, 5 Q. B. Div. 149; *Rochester Lantern Co. v. Press Co.*, 135 N. Y. 209, 81 N. E. Rep. 1018.



ferred. In such case, liabilities attaching to the enjoyment of the interest pass with it. This will be discussed presently.

#### **SAME—ASSIGNMENT OF RIGHTS BY ACT OF PARTIES.**

**224. AT COMMON LAW**—Rights arising out of a contract cannot be assigned at common law except—

**EXCEPTIONS** — (a) By an agreement between the original parties and the intended assignee, which is subject to all the rules for the formation of a valid contract. This is, in effect, a rescission of the contract, and the substitution of a new agreement.

(b) By the rules of the law merchant in the case of

(1) Negotiable bills of exchange and (by statute) promissory notes.

(2) Bonds of corporations.

(3) To some extent, bills of lading.

(c) An assignment in equity is so far recognized at common law as to permit the assignee to sue thereon in the name of the assignor or his representatives.

**225. IN EQUITY**—A chose in action, or rights under a contract, may be assigned in equity whenever the contract is not for exclusively personal services, and does not involve personal credit, trust, and confidence, and the assignee may sue in equity in his own name. But—

**CONDITIONS** — (a) There must be a consideration given by the assignee.

(b) Notice is necessary to bind the debtor or person liable.

(c) The assignee takes subject to all such defenses as would have prevailed against the assignor.

**226. BY STATUTE**—There are statutes in most states allowing the assignment of choses in action, and a suit at law by the assignee in his own name.

At common law, apart from the customs of the law merchant, which we will presently discuss, the rights or benefits arising out of a contract, or, as it is generally termed, a chose in action, cannot be assigned so as to entitle the assignee to sue upon it in his own name.<sup>37</sup> This is a settled and inflexible rule of the common law, and its effect cannot be avoided by stipulations of the parties, as by an express provision in the contract to the effect that it may be assigned, provided, of course, the stipulation does not render the contract a negotiable instrument, and so bring it within the law merchant.<sup>38</sup> As will be seen, however, the assignment creates rights in equity, and the common law so far takes cognizance of these equitable rights that the name of the assignor, or his representative if the assignor be dead, may be used as trustee for the assignee, so that he may sue on the contract in their name. An equitable assignment of a chose in action is in the nature of a declaration of trust by the party having the legal right, and an agreement on his part to permit the assignee to make use of his name to enforce it.<sup>39</sup>

Strictly speaking, the only mode by which the rights under a contract can be really transferred at law is, not by assignment at all, but by means of a substituted agreement. If A. owes B. \$100, and B. owes C. \$100, it may be agreed between all three parties that A. shall pay C. instead of paying B., so that B. thereby terminates

<sup>37</sup> Leake, Cont. 601; Co. Litt. 214a, 232b; 2 Bl. Comm. 442; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1; Skinner v. Somes, 14 Mass. 107; Hay v. Green, 12 Cush. (Mass.) 282; Hunt v. Mann, 132 Mass. 53; Usher v. D'Wolfe, 13 Mass. 290; Orr v. Amory, 11 Mass. 25. "The origin of the rule was attributed by Coke to the 'wisdom and policy of the founders of our law' in discouraging maintenance and litigation; but there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor." Pol. Cont. 206.

<sup>38</sup> Coolidge v. Ruggles, 15 Mass. 387; Clark v. King, 2 Mass. 524; Skinner v. Somes, 14 Mass. 107; First Nat. Bank v. Carson, 60 Mich. 432, 27 N. W. Rep. 589; Weldler v. Kauffman, 14 Ohio, 455; Legro v. Staples, 16 Me. 252; Little v. Bank, 2 Hill (N. Y.) 425, 7 Hill (N. Y.) 359; People v. Gray, 23 Cal. 125.

<sup>39</sup> Leake, Cont. 602; Halloran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 181 Mass. 31; Frear v. Evertson, 20 Johns. (N. Y.) 142; McWilliam v. Webb, 32 Iowa, 577; Webb v. Steele, 13 N. H. 230.

his legal relations with both parties. In such case the consideration for A.'s promise is the discharge of B.; the consideration for B.'s discharge of A. is the extinguishment of his debt to C.; the consideration for C.'s promise is the substitution of A.'s liability for that of B. This is known as a "novation."<sup>40</sup> To effect such a change of relations, there must be ascertained sums due from A. to B., and from B. to C.; and it is further essential that there shall be a definite agreement between the parties, for it is the promise of each which is the consideration for the promise of the others. It would not be enough for A. to say to C., "I will pay you instead of B.," and to afterwards suggest the arrangement to B., and receive his assent.<sup>41</sup> Nor would it be enough for B. to authorize A. in writing to pay to C., and for A. to acknowledge the paper in writing.<sup>42</sup> In neither of these cases would there be such an agreement between all three persons as to amount to a discharge by B. of the debt due by him to A. There would, therefore, be no consideration for A.'s promise to pay C., so as to support an action by C. against him. In an action under the circumstances of the second case mentioned above by C. against A. it was said: "There are two legal principles which, so far as I know, have never been departed from. One is that, at common law, a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and, that being the law, it is perfectly clear that B. could not assign to the plaintiff the debt due from the defendant to him. \* \* \* The other principle which would be infringed by allowing this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action. \* \* \* No doubt, a debtor may, if he thinks fit, promise to pay his debt to a person other than his creditor; and, if there is any consideration for the promise, he is bound to perform it. But here there was none whatever. There was no agreement to give time, or that the debt of B. should be extinguished,—no indulgence to him; nor detriment to the plaintiff. There was nothing in the nature of a consideration

<sup>40</sup> Post, p. 613.

<sup>41</sup> *Cuxon v. Chadley*, 3 Barn. & C. 581.

<sup>42</sup> *Liversidge v. Broadbent*, 4 Hurl. & N. 603.

moving from the plaintiff to the defendant, but a mere promise by the defendant, to pay another man's debt." <sup>43</sup>

From what has been said, it may be laid down as the rule, subject to certain exceptions under the law merchant, that a contract cannot be assigned at common law except by an agreement between the original parties and the assignee, and that this agreement is subject to all the rules for the formation of a valid contract. The exceptions under the law merchant will be discussed in a subsequent paragraph.

*Same—Recognition of Equitable Assignment in Law.*

Courts of common law recognize the validity of equitable assignments for other purposes than to permit the assignee to sue at law in the name of the assignor. An assignment of a chose in action has always been held a good consideration for a promise.<sup>44</sup> Thus, the benefit of a contract may be sold, and the assignment of the contract forms a valid consideration for a promise to pay the price, which may be recovered in an action at law.<sup>45</sup> The forbearance by the assignee of a debt to sue the debtor is a good consideration for an express promise by the debtor to pay the assignee, and on this promise the assignee may maintain an action in his own name.<sup>46</sup> He must sue on the debtor's promise to him, and not on the promise to the assignor assigned to him.

*Rule in Equity.*

Equity will permit the assignment of a chose in action, or the rights which accrue under a contract, whenever the contract is not for exclusively personal services, and does not involve personal credit, trust, or confidence; and a suit in equity may be maintained by the assignee in his own name. He need not, as at common law,

<sup>43</sup> *Liversidge v. Broadbent*, *supra*.

<sup>44</sup> *Leake*, Cont. 605; *Master v. Miller*, 4 Term R. 341; *Skinner v. Somes*, 14 Mass. 107.

<sup>45</sup> *Price v. Seaman*, 4 Barn. & C. 525.

<sup>46</sup> *Morton v. Burn*, 7 Adol. & El. 19; *Fenner v. Mears*, 2 W. Bl. 1269; *Skinner v. Somes*, 14 Mass. 107; *Crocker v. Whitney*, 10 Mass. 316; *Jessel v. Insurance Co.*, 3 Hill (N. Y.) 88; *Compton v. Jones*, 4 Cow. (N. Y.) 13; *Onion v. Paul*, 1 Har. & J. (Md.) 114.

sue in the name of his assignor.<sup>47</sup> Certain conditions, however, affect the rights of the assignee in equity: (1) In the first place, the assignment will not be upheld unless a consideration has been given by the assignee. (2) The assignment will not bind the person liable until he has received notice of it, though it is effectual as between the assignor and assignee from the moment of the assignment. (3) The assignee takes subject to all such defenses as might have prevailed against the assignor. In other words, the assignor cannot give a better title than he has himself.

As we shall presently see, there are various statutes in most of the states either expressly or impliedly authorizing the assignment of choses in action, so as to give the assignee a right to sue at law in his own name. Where the statute is general, or does not provide otherwise, it is held that it allows such assignments at law as were formerly allowed in equity, and leaves them subject at law to the same rules as governed them in equity. What we shall now say, therefore, in regard to assignments in equity, will generally apply to assignments at law authorized by these statutes, and no distinction is necessary in the citation of cases.

*Same—What is Assignable.*

It may be said generally that anything which directly or indirectly involves a right of property is assignable,<sup>48</sup> with the exception that rights and liabilities under an executory contract for per-

<sup>47</sup> Story, Eq. Jur. § 1057; *Smith v. Brittain*, 3 Ired. Eq. (N. C.) 347. But see *Tibbetts v. Gerrish*, 25 N. H. 41. "But a court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy;" for the rule is that equity will not take jurisdiction where there is an adequate remedy at law. See *Walker v. Brooks*, 125 Mass. 241; *Carter v. Insurance Co.*, 1 Johns. Ch. (N. Y.) 463; *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. Rep. 544; *New York Guaranty & Indemnity Co. v. Water Co.*, 107 U. S. 205, 2 Sup. Ct. Rep. 279; *Adair v. Winchester*, 7 Gil. & J. (Md.) 114; *Smiley v. Bell*, Mart. & Y. (Tenn.) 378; *Moseley v. Bush*, 4 Rand. (Va.) 392.

<sup>48</sup> *Mulhall v. Quinn*, 1 Gray (Mass.) 105; *Devlin v. City of New York*, 63 N. Y. 8; *Harbord v. Cooper*, 43 Minn. 466, 45 N. W. Rep. 860; *Cook v. Bell*, 18 Mich. 387; *Dayton v. Fargo*, 45 Mich. 153; *Grant v. Ludlow*, 8 Ohio St.

sonal services, or contracts otherwise involving personal credit, trust, or confidence cannot be assigned.<sup>49</sup> Such things pass to the personal representatives of the party liable or entitled, and, as we shall see, are thus assigned by operation of law; and it has been said that "the power to assign and to transmit to personal representatives are convertible propositions."<sup>50</sup> A person who has made a contract to render personal services cannot assign his right to render such services, but he can assign his right to receive pay for them when rendered by him; and so, it seems, a man can assign the money to become due under any contract.<sup>51</sup>

1; *Burkett v. Moses*, 11 Rich Law (S. C.) 432; *Louisville R. Co. v. Goodbar*, 88 Ind. 213; *Gray v. Garrison*, 9 Cal. 325; *La Rue v. Groezinger*, 84 Cal. 281, 24 Pac. Rep. 42, 45. As to assignment of salary or pension by officer, see ante, p. 419.

<sup>49</sup> *Robson v. Drummond*, 2 Barn. & Adol. 303; *British Waggon Co. v. Lea*, 5 Q. B. Div. 149; *Arkansas V. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 Sup. Ct. Rep. 1308; *Bethlehem v. Annis*, 40 N. H. 34; *Rappleye v. Seeder Co.*, 79 Iowa, 220, 44 N. W. Rep. 363; *Sloan v. Williams*, 138 Ill. 43, 27 N. E. Rep. 531; *Griswold v. Railroad Co.*, 18 Mo. App. 52; *Lansden v. McCarthy*, 45 Mo. 106; *Daly v. Stetson*, 54 N. Y. Super. Ct. R. 202; *Burger v. Rice*, 3 Ind. 125; *Joslyn v. Parlin*, 54 Vt. 670; *Chapin v. Longworth*, 31 Ohio St. 421; *Davenport v. Gentry*, 9 B. Mon. (Ky.) 427; *Devlin v. City of New York*, 63 N. Y. 8. A contract by a publisher with an author to publish a work has been held not assignable by the publisher without the author's consent, because of the personal trust placed in the publisher by the author. *Stevens v. Benning*, 1 Kay & J. 168; *Gibson v. Carruthers*, 8 Mees & W. 321, at page 343. A contract for the sale of goods on credit cannot be assigned by the vendee without the vendor's consent. *Arkansas V. Smelting Co. v. Belden Min. Co.*, supra. "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence, such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pol. Cont. 425.

<sup>50</sup> *Zabriskie v. Smith*, 13 N. Y. 333; *Byxble v. Wood*, 24 N. Y. 607; *Devlin v. City of New York*, 63 N. Y. 8. But see dictum in *Arkansas V. Smelting Co. v. Belden Min. Co.*, supra.

<sup>51</sup> *Devlin v. City of New York*, 63 N. Y. 8; *Thayer v. Kelley*, 28 Vt. 19; *Weed v. Jewett*, 2 Metc. (Mass.) 608; *Brackett v. Blake*, 7 Metc. (Mass.) 335; *Emery v. Lawrence*, 8 Cush. (Mass.) 151; *Garland v. Harrington*, 51 N. H. 409; *Field v. City of New York*, 6 N. Y. 179; *Crawford v. Brooke*, 4 Gill (Md.) 213; *Shaffer v. Mining Co.*, 55 Md. 74; *Hawley v. Bristol*, 39 Conn. 26; *Angur v. Belting Co.*, Id. 536; *Greene v. Bartholomew*, 34 Ind. 235; *Metcalf v. Kincaid* (Iowa) 54 N. W. Rep. 867; *Bates v. Lumber Co.* (Minn.)

*Same—Partial Assignment.*

A debtor has a right to pay his debt as a whole, and cannot without his consent be subjected to separate actions by different persons. A creditor, therefore, cannot, at law at least, assign a part of his claim without the debtor's consent.<sup>52</sup> "A creditor shall not

57 N. W. Rep. 218. A person, however, to assign his future earnings, must be in the actual employment of another. One not engaged in any employment for another, and not under contract for employment, cannot, even for a valuable consideration, make a valid assignment of wages he may earn in the future. Such an assignment is an attempt to assign that which has no existence, either substantial or incipient, there being no contract on which an indebtedness may arise. It is the mere possibility of a subsequent acquisition of property, which is too vague and uncertain to be sustained as a valid assignment and transfer of property. *Mulhall v. Quinn*, 1 Gray (Mass.) 105; *Hamilton v. Rogers*, 8 Md. 301; *Lehigh Valley R. Co. v. Woodring*, 116 Pa. St. 513, 9 Atl. Rep. 58. But see *Edwards v. Peterson*, 80 Me. 367, 14 Atl. Rep. 936. The rule just mentioned is general. A thing to be assignable, must have at least a potential existence at the time of the assignment. See the cases cited above; and see *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623; *Moody v. Wright*, 13 Metc. (Mass.) 17; *Hassie v. Congregation*, 35 Cal. 378; *Skipper v. Stokes*, 42 Ala. 255; *Needles v. Needles*, 7 Ohio St. 432. The fact that the thing assigned rested in possibility only at the time of the assignment will not prevent enforcement of the assignment, if the thing had a potential existence. Actual existence is not necessary. Money, for instance, to be earned under an existing contract, is, as we have seen above, assignable, though the contract may possibly never be performed; but money to be earned under a contract not yet made cannot be assigned. See the cases above cited. A man could not assign money to become due under an insurance policy not yet issued, but, after issuance of the policy, he may do so before any loss. *Bergson v. Insurance Co.*, 38 Cal. 541. Nor, probably, could a man assign rent to become due under a lease not made, but he can assign future rent under an existing lease. *Demarest v. Willard*, 8 Cow. (N. Y.) 206. A contract between an insurance company and its agent, by which the latter is entitled to receive commissions on renewal premiums, to accrue annually for a given period in the future, is assignable by the agent, as the contract is not dependent upon any contingency, though the profits arising under it are. *Knevals v. Blauvelt*, 82 Me. 458, 19 Atl. Rep. 818.

<sup>52</sup> *James v. City of Newton*, 142 Mass. 366, 8 N. E. Rep. 122; *Manderville v. Welch*, 5 Wheat. 277; *Carter v. Nichols*, 58 Vt. 553; *National Exch. Bank v. McLoon*, 73 Me. 498; *Getchell v. Maney*, 69 Me. 442; *Beardsley v. Morgner*, 73 Mo. 22; *Tripp v. Brownell*, 12 Cush. (Mass.) at page 382; *Gibson v. Cooke*, 20 Pick. (Mass.) 15; *Millroy v. Iron Co.*, 43 Mich. 231, 5 N. W. Rep.

be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has the right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons."<sup>53</sup> Though the dictum in the case from which we have just quoted and in some of the other cases seems to the contrary,<sup>54</sup> it has been held that the rule only applies where the assignment is sought to be enforced at law in the name of the assignor, and that in equity a partial assignment is good.<sup>55</sup>

*Same—Form of Assignment.*

No particular form for an assignment is necessary, unless it is required by statute. In the absence of a statute an equitable assignment made be made without any deed or writing, by any words or acts showing a clear intention to assign.<sup>56</sup> An order made by

287; *Grain v. Aldrich*, 38 Cal. 514; *Philadelphia's Appeal*, 86 Pa. St. 179; *Miller v. Bledsoe*, 1 Scam. (Ill.) 530; *Knowlton v. Cooley*, 102 Mass. 233. Where a contract for work provides for payment in installments, each installment is a separate demand, and may be assigned. *Adler v. Railroad Co.*, 92 Mo. 242, 4 S. W. Rep. 917.

<sup>53</sup> Per Story, J., in *Mandeville v. Welch*, *supra*.

<sup>54</sup> *Kingsbury v. Burrill*, 151 Mass. 199, 24 N. E. Rep. 36.

<sup>55</sup> *James v. City of Newton*, 142 Mass. 366, 8 N. E. Rep. 122; *National Exchange Bank v. McLoon*, 73 Me. 498; *Canty v. Latterner*, 31 Minn. 239, 17 N. W. Rep. 385; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Field v. City of New York*, 6 N. Y. 179; *Risley v. Phoenix Bank*, 83 N. Y. 318, at page 329; *Daniels v. Meinhard*, 53 Ga. 359; *Forsyce v. Nelson*, 91 Ind. 447; *Lapping v. Duffy*, 47 Ind. 51; *Campbell v. Hildebrand* (Tex. Sup.) 3 S. W. Rep. 243; *Etheridge v. Vernoy*, 74 N. C. 800; *Bower v. Haddon Blue Stone Co.*, 30 N. J. Eq. 171; *Grain v. Aldrich*, 38 Cal. 514; *County of Des Moines v. Hinckley*, 62 Iowa, 637, 17 N. W. Rep. 915. Contra, *Burnett v. Crandall*, 63 Mo. 410; *Gardner v. Smith*, 5 Heisk. (Tenn.) 256.

<sup>56</sup> *Leake*, Cont. 603; *Row v. Dawson*, 1 Ves. Sr. 331; *Heath v. Hall*, 4 Taunt. 326; *Bower v. Haddon Blue Stone Co.*, 30 N. J. Eq. 171; *Brokaw v. Brokaw*, 41 N. J. Eq. 304, 7 Atl. Rep. 414; *Tingle v. Fisher*, 20 W. Va. 497; *Shannon v. City of Hoboken*, 37 N. J. Eq. 123; *Crane v. Gough*, 4 Md. 310; *Watson v. Bagaley*, 12 Pa. St. 164; *Bank of Commerce v. Bogy*, 44 Mo. 13.



a creditor on his debtor to pay the debt to another would amount to an equitable assignment of the debt to the person in whose favor it is made or to whom it is given.<sup>57</sup> As between the parties to the assignment, it is generally governed by the rules governing other contracts. It may be conditional, or as security, as well as absolute.<sup>58</sup>

By statute in some of the states, allowing assignments of choses in action at law, and suit by the assignee in his own name, it is required that the assignment shall be in writing, signed by the assignor or his agent. If it is not in such a form, it is only an equitable assignment, and suit, if in the assignee's name, must be brought in equity or, if suit is brought at law, it must be in the name of the assignor.<sup>59</sup>

*Same—Notice of Assignment.*

The assignment is complete as between the assignor and the assignee, or those standing in their shoes and representing them, without any notice to the debtor or person liable;<sup>60</sup> but it will not bind the debtor until he has received notice of it.<sup>61</sup> A person liable

<sup>57</sup> Story, Eq. Jur. § 1044; *Mandeville v. Welch*, 5 Wheat. 285; *Switzer v. Noffsinger*, 82 Va. 518; *Wilson v. Carson*, 12 Md. 54.

<sup>58</sup> *Draper v. Fletcher*, 20 Mich. 154; *Heebstreit v. Beckwith*, 35 Mich. 93; *Gill v. Weller*, 52 Md. 8; *Hunting v. Emmart*, 55 Md. 265. An assignment, as we have seen, like any other contract, may be illegal and contrary to public policy, as where an officer assigns his unearned salary, or a person assigns a mere right to sue (ante, pp. 419, 437); and, like any other contract, it must, as between the parties, be supported by a consideration if unexecuted. The debtor, however, cannot object for want of consideration.

<sup>59</sup> *Tradesman's Bank v. Green*, 57 Md. 602; *Mutual Ins. Co. v. Watson*, 30 Fed. Rep. 653 (Georgia statute); *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. Rep. 107.

<sup>60</sup> *Muir v. Schenck*, 3 Hill (N. Y.) 228; *Wood v. Partridge*, 11 Mass. 488; *Thayer v. Daniels*, 113 Mass. 129; *Conway v. Cutting*, 51 N. H. 407; *Burn v. Carvalho*, 4 Mylne & C. 690; *Bishop v. Holcomb*, 10 Conn. 444; *Moore v. Holcombe*, 3 Leigh (Va.) 597.

<sup>61</sup> *Stebbins v. Bruce*, 80 Va. 389; *Fraley's Appeal*, 76 Pa. St. 42; *Bostwick v. Bryant* (Ind. Sup.) 16 N. E. Rep. 378; *Richard v. Griggs*, 16 Mo. 416; *Winberry v. Koonce*, 83 N. C. 351; *Porter v. Dunlap*, 17 Ohio St. 591; *Shade v. Creviston*, 93 Ind. 591. In case of bankruptcy of the debtor before notice of an assignment of the debt or contract, it would pass to his assignees in bankruptcy. *Ryall v. Rowles*, 1 Ves. Sr. 348; *Dean v. James*, 1 Adol. & E.

under a contract has a right to know to whom his liability is due, and therefore, if he receives no notice that it is due to another than the party with whom he originally contracted, and pays the latter, he is entitled to credit for the payment.<sup>62</sup> If, for instance, a mortgage is assigned by the mortgagee without notice to the mortgagor, and the mortgagor afterwards pays the principal or interest to the mortgagee or his duly authorized agent, the payment is good as against a subsequent claim by the assignee.<sup>63</sup> The reason of the rule has been thus stated: "The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a court of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the court has therefore required notice to be given to the debtor of the assignment in order to perfect the title of the assignee."<sup>64</sup>

The notice of the assignment need not be given in any formal manner, or with the express purpose of completing the assignment; nor, it seems, need any actual notice be given. Notice or knowledge of the assignment, however acquired, is sufficient to affect the debtor with the trust, and the manner or purpose of giving or obtaining notice is immaterial; and it has even been held that if the debtor has been put upon inquiry, which should have resulted in knowledge, he may be charged with constructive notice.<sup>65</sup> Mere notice

809. But it is otherwise where notice has been received before bankruptcy. *Crowfoot v. Gurney*, 9 Bing. 372; *Hutchinson v. Heyworth*, 9 Adol. & E. 375.

<sup>62</sup> *Robinson v. Marshall*, 11 Md. 251.

<sup>63</sup> *Williams v. Sorrell*, 4 Ves. 389; *Van Keuren v. Corkins*, 66 N. Y. 77.

<sup>64</sup> *Stocks v. Dobson*, 4 De Gex. M. & G. 15.

<sup>65</sup> *Smith v. Smith*, 2 Crompt. & M. 231; *Anderson v. Van Alen*, 12 Johns. (N. Y.) 343; *Meux v. Bell*, 1 Hare, 73; *Van Keuren v. Corkins*, 66 N. Y. 77; *Edwards v. Scott*, 1 Man. & G. 962; *Heermans v. Ellsworth*, 64 N. Y. 159; *Tibbitts v. George*, 5 Adol. & E. 107; *Riley v. Taber*, 9 Gray (Mass.) 372; *Barron v.*

to the debtor, without concurrence or consent on his part, is sufficient to make the assignment effective. After notice of the assignment, he cannot refuse to be bound by it;<sup>66</sup> and a payment by him to the original debtor will not discharge the debt.<sup>67</sup>

*Same—Title of Assignee.*

It is the general rule, both at law and in equity, that a person cannot acquire title to a chose in action from one who has himself no title to it; and that, if a man takes an assignment of a chose in action, he takes his chance as to the exact position in which the party giving it stands. In other words, the assignee of a chose in action takes it subject to all the equities of the debtor against the assignor existing at the time of the assignment.<sup>68</sup> If the debtor,

Porter, 44 Vt. 587; Dale v. Kimpton, 46 Vt. 76; Bean v. Simpson, 16 Me. 49; Kellogg v. Krauser, 14 Serg. & R. (Pa.) 137; Guthrie v. Bashline, 25 Pa. St. 80.

<sup>66</sup> Tibbits v. George, 5 Adol. & E. 107; Brill v. Tuttle, 81 N. Y. 454; Switzer v. Noffsinger, 82 Va. 518; Savage v. Gregg (Ill. Sup.) 37 N. E. Rep. 312.

<sup>67</sup> Brill v. Tuttle, *supra*; Brice v. Bannister, 3 Q. B. Div. 569; Hall v. Insurance Co., 111 Mass. 53; Whitman v. Arms Co., 55 Conn. 247, 10 Atl. Rep. 571; Shriner v. Lamborn, 12 Md. 170; Kitzinger v. Beck (Colo. App.) 35 Pac. Rep. 278; Schilling v. Mullen (Minn.) 56 N. W. Rep. 586.

<sup>68</sup> Crouch v. Credit Foncier, L. R. 8 Q. B. 380; Mangles v. Dixon, 3 H. L. Cas. 702, 735; First Nat. Bank v. Carson, 60 Mich. 432, 27 N. W. Rep. 589; Clute v. Robison, 2 Johns. (N. Y.) 595; Littlefield v. Bank, 97 N. Y. 581; Callanan v. Edwards, 32 N. Y. 483; Kleeman v. Frisbie, 63 Ill. 482; Buckner v. Smith, 1 Wash. (Va.) 296; Kamena v. Huelbig, 23 N. J. Eq. 78; Jack v. Davis, 29 Ga. 219; Bloomer v. Henderson, 8 Mich. 395; Warner v. Whitaker, 6 Mich. 133; Spinning v. Sullivan, 48 Mich. 5, 11 N. W. Rep. 755; Edson v. Gates, 44 Mich. 253, 6 N. W. Rep. 645; Barney v. Grover, 28 Vt. 391; Martin v. Richardson, 68 N. C. 255; Lane v. Smith, 103 Pa. St. 415; Moore v. Holcombe, 3 Leigh (Va.) 597; Willis v. Twambly, 13 Mass. 204; Robeson v. Roberts, 20 Ind. 155; Shade v. Creviston, 93 Ind. 591; Goldsborough v. Cradle, 28 Md. 477; Schaferman v. O'Brien, Id. 565; Hardesty v. Jones, 10 Gill & J. (Md.) 404; Boardman v. Hayne, 29 Iowa, 339; Ayers v. Campbell, 9 Iowa, 213; President, etc., of Natchez v. Minor, 9 Smedes & M. (Miss.) 544; Woodson v. Barrett, 2 Hen. & M. (Va.) 80; Russell v. Kirkbride, 62 Tex. 455; Hill v. McPherson, 15 Mo. 204. If the debtor does anything to mislead the assignee, he may be estopped; and in this way the assignee may get a better title than his assignor, but this in no way conflicts with the rule stated in the text. Holbrook v. Burt, 22 Pick. (Mass.)

for instance, has a right of set-off against the debt at the time of the assignment, he may enforce the right as against the assignee;<sup>69</sup> and, as we have already seen, he may enforce a right of set-off acquired after the assignment, but before he received notice of it.<sup>70</sup> Since, however, notice thereof completes the assignment as against the debtor, he cannot set off a claim afterwards acquired.<sup>71</sup> So, also, if a party is induced to enter into a contract by fraud, and the fraudulent party assigns his interest in the contract, the party defrauded may, under some circumstances, have the contract set aside in equity in spite of the assignment, and this though the assignee may have paid full value to the assignor, and may have been wholly innocent in the matter. On this point, however, there is some conflict. We have already considered the question in treating of the effect of fraud.<sup>72</sup>

It is possible that the parties to a contract may stipulate that, if either assign his rights under it, the assignment shall be "free from equities;" that is to say, that the assignee shall not be liable to be

546; *Kemp v. McPherson*, 7 Har. & J. (Md.) 320; *Johnson v. Insurance Co.*, 39 Md. 233; *Woodson v. Barrett*, 2 Hen. & M. (Va.) 80; *Scott v. Sadler*, 52 Pa. St. 211; *Buckner v. Smith*, 1 Wash. (Va.) 296; *Boardman v. Hayne*, 29 Iowa, 339.

<sup>69</sup> *Story*, Eq. Jur. § 1047; *Cavendish v. Greaves*, 24 Beav. 163; *Massachusetts Loan & Trust Co. v. Welch*, 47 Minn. 183, 49 N. W. Rep. 740; *Greene v. Hatch*, 12 Mass. 195; *Zabriskie v. Railroad Co.*, 131 N. Y. 172, 29 N. E. Rep. 1006; *Wood v. City of New York*, 73 N. Y. 556; *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. Rep. 898; *First Nat. Bank v. Bynum*, 84 N. C. 24; *Hooper v. Brundage*, 22 Me. 460; *Hunt v. Shackleford*, 55 Miss. 94; *Sanborn v. Little*, 3 N. H. 539; *Littlefield v. Bank*, 97 N. Y. 581; *Jack v. Davis*, 29 Ga. 219. An unmatured debt, existing at the time of the assignment, in favor of the debtor against the assigning creditor, cannot be set off against the assignee. *Roberts v. Carter*, 38 N. Y. 107; *Martin v. Kunzmueller*, 37 N. Y. 396; *Myers v. Davis*, 22 N. Y. 489; *Chambliss v. Matthews*, 57 Miss. 306; *Backus v. Spaulding*, 129 Mass. 234; *Adams v. Rodarmel*, 19 Ind. 339; *Graham v. Tilford*, 1 Metc. (Ky.) 112; *Follett v. Buyer*, 4 Ohio St. 586.

<sup>70</sup> *McCabe v. Gray*, 20 Cal. 509; *Abshire v. Corey*, 113 Ind. 484, 15 N. E. Rep. 685; *Faulkner v. Swart* (Sup.) 8 N. Y. Supp. 239; *Adams v. Leavens*, 20 Conn. 73.

<sup>71</sup> *Goodwin v. Cunningham*, 12 Mass. 192; *St. Andrew v. Manuf'g Co.*, 134 Mass. 42; *Weeks v. Hunt*, 6 Vt. 15; *Crayton v. Clark*, 11 Ala. 787.

<sup>72</sup> *Graham v. Johnson*, L. R. 8 Eq. 38; *Holbrook v. Burt*, 22 Pick. (Mass.) 546. But see *Bloomer v. Henderson*, 8 Mich. 395; ante, p. 352.

met by such defenses as would have been valid against his assignor.<sup>73</sup> It is by no means certain, however, that such a stipulation would protect the assignee against the effects of any vital defect in the formation of the original contract.

*Same—Priority between Assignees.*

It is held in England that "equitable titles have priority according to the priority of notice;"<sup>74</sup> that the successive assignees of an obligation rank as to their title according to the dates at which they gave notice to the party to be charged. This doctrine is also recognized by the courts of some of our states, and by the supreme court of the United States.<sup>75</sup> The courts of many of the states, on the other hand, refuse to recognize it, and hold that equitable titles have priority, not according to the priority of notice, but according to priority in time of assignment. They hold that since, as between the assignor and assignee of a chose in action, the contract is complete without any notice to the debtor, and since a purchaser of a chose in action must always abide by the case of the person from whom he buys, therefore, as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though he has given no notice either to the subsequent assignee or to the debtor.<sup>76</sup>

*Under Statutes.*

In most of the states, statutes have been enacted changing the common-law rules in relation to assignments of choses in action. These statutes vary somewhat in the different states, so that it would be impracticable to attempt to set them out. In most states it is substantially provided that the assignee of a chose may sue the debtor in his own name in the same manner as the assignor might have done before the assignment. In some states the same

<sup>73</sup> *Ex parte Asiatic Banking Corp.*, 2 Ch. App. 397.

<sup>74</sup> *Stocks v. Dobson*, 4 De Gex, M. & G. 15.

<sup>75</sup> *Ward v. Morrison*, 25 Vt. 593; *Murdock v. Finney*, 21 Mo. 138; *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330; *White v. Prentiss*, 3 T. B. Mon. (Ky.) 448; *Judson v. Corcoran*, 17 How. 612; *In re Gillespie*, 15 Fed. Rep. 734.

<sup>76</sup> *Muir v. Schenck*, 3 Hill (N. Y.) 228; *Thayer v. Daniels*, 113 Mass. 129; *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Tingle v. Fisher*, 20 W. Va. 497; *Newby v. Hill*, 2 Metc. (Ky.) 530; *Ohio Ins. Co. v. Ross*, 2 Md. Ch. 25.

result is accomplished by statutes requiring actions to be brought in the name of the "real party in interest." It may be said generally that the effect of the statutes is to put an assignment of a chose in action on the same footing at law as in equity. What we have said, therefore, in treating of assignments in equity, generally applies to assignments at law under the statutes.<sup>17</sup> The statutes have made some changes in the law, and some of these we have called attention to in the proper connection under equitable assignments.

*Customs of the Law Merchant.*

Thus far we have dealt with the assignment of contracts by the rules of the common law, in equity, and under statutes. In none of those cases does the assignment bind the party chargeable to the assignee until notice is given to him, and in none of them can the assignor give a better title than he has himself. It remains for us to deal now shortly with a class of promises the benefit of which is assignable, under the law merchant, in such a way that the promise may be enforced by the assignee without previous notice to the promisor, and without the risk of being met by defenses which would have prevailed as against the assignor.

These contracts are for the most part what are called "negotiable instruments," and their transfer is termed "negotiation" as distinguished from "assignment." This book deals with the law of contracts generally, and it would be beyond its purpose to go at any length into the law of negotiable instruments. That is a branch of the law of contracts which is treated in a separate work.<sup>18</sup> It is only necessary here to give a general treatment of the subject, sufficient to show the difference between the negotiation or transfer of negotiable instruments and the assignment of other kinds of contracts, or the difference between assignability and negotiability.

The essential features of negotiability, as distinguished from assignability, are (1) that the written promise gives a right of action to the holder of the instrument for the time being, though he and

<sup>17</sup> *Dakin v. Pomeroy*, 9 Gill (Md.) 1; *Doering v. Kenamore*, 83 Mo. 588; *Strong v. Clem*, 12 Ind. 37; *Jordan v. Thornton*, 7 Ark. 224.

<sup>18</sup> *Norton, Bills & N.*

his holding may be alike unknown to the promisor; and (2) the holder is not prejudiced by defects in the title of his assignor; he does not hold subject to such defenses as would be good against his assignor. Notice therefore, need not be given to the party liable, and the assignor's title is immaterial.

Bills of exchange are negotiable by the custom of merchants, or the law merchant, recognized by the courts. Indeed, it may be said that the law merchant has become a part of the common law. Others have been made negotiable by statute, such as promissory notes, which were made negotiable and put upon the same footing as bills of exchange by the statute of 3 & 4 Anne, c. 9, §§ 1-3. In this country bonds of certain corporations are also held negotiable, even independently of statutory provisions. Bills of lading, which are affected both by the law merchant and by statute, will be presently discussed.

*Same—Bills of Exchange and Promissory Notes.*

A bill of exchange is an unconditional written order, addressed by one person, called the "drawer," to another, called the "drawee," to pay a sum of money to a specified person or his order, or to bearer, the person to whom it is payable being called the "payee." By drawing the bill, the drawer promises to pay the sum specified to the payee or to any subsequent holder if the drawee does not accept the bill, or if, having accepted, he does not pay it. When the drawee accepts the bill, he is called the "acceptor." He accepts by assenting to pay the sum specified, and expresses his assent by writing on the bill signed by him, or by his simple signature. The acceptance is an unconditional promise to pay the sum named when due. If the bill is payable to a specified person or bearer, it may be transferred from one holder to another by mere delivery. If payable to a specified person or order, it must be transferred by his indorsement, the indorsement being an order written upon the bill, and signed by the indorser in favor of the indorsee. The effect of the indorsement is to assign to the indorsee the right to demand acceptance or payment of the bill from the acceptor when due, and, in the event of default by the acceptor, to demand payment of the original drawer, or of the indorser against whom he has a concurrent remedy. If the indorsement is to the indorsee, or to the indorsee or order, it may be transferred by him to whomso-

ever he chooses, in the same manner as it was transferred to him. If the indorsement be the mere signature of the indorser, it is indorsed in blank, and the bill becomes payable to bearer, and transferable by mere delivery.

A promissory note is a promise in writing made by one person, called the "maker," that he will pay a certain sum at a specified time, or on demand, to another person, called the "payee," or order, or to bearer. The maker of a note occupies a similar position to that of the acceptor of a bill of exchange, and the rules as to transfer by delivery or indorsement are similar to those relating to a bill of exchange.

Where the indorsee of a bill or note calls upon the acceptor or maker to pay, he might, at least if the bill or note were an ordinary contract, have to show that he gave consideration to the indorser or transferrer for the transfer; that notice of the transfer was given to the acceptor or maker; and he would have no better title than his indorser or transferrer had. These rules, however, do not apply to negotiable instruments. Consideration is presumed to have been given until the contrary appears, and notice of the transfer is not necessary. If the instrument turns out to have been given for a gambling debt, or to have been obtained by fraud, or for any other reason is illegal or voidable, the indorsee's position is modified. As between the original parties to the instrument, it would be void or voidable, according to the circumstances, as would be the case with an ordinary contract, but this does not affect the rights of a bona fide holder for value; that is, a person who gave consideration for the instrument, and had no notice of the vitiating elements in its origin. The presumptions of law under these circumstances are (1) that the holder did not give value, and (2), in most jurisdictions, that he had notice of the fraud or illegality. It will be for him to show both that he gave value, and that he had no knowledge of the fraud or illegality. If the holder proves consideration, and ignorance of the vitiating circumstances, then the holder can recover in spite of the defective title of his indorser or transferrer. As we have said, in most jurisdictions the burden is on the holder to show that he is an innocent holder, as well as a holder for value. As to this there is a conflict. In England, and in some of our states, he is presumed not to have given value, but the presumption



is that he was ignorant of the fraud or illegality, and the burden of showing knowledge is on the acceptor, drawer, or maker.

*Same—Instruments under Seal.*

These rules do not apply to instruments under seal, such as a bond, since, under the law merchant, a sealed instrument is not negotiable and no words inserted by the parties can make it so.<sup>79</sup> By the modern decisions, however, as we shall now see, an exception has been made in the case of bonds issued by a corporation.

*Same—Bonds of Corporation.*

By the weight of modern decisions, the bonds of a municipal corporation, railroad company, or other like corporation, though under seal, and therefore not negotiable under the law merchant as bills or notes, are nevertheless held to be negotiable instruments, where they are given to secure the payment of money upon time, and contain on their face an expression showing that they are expected to pass from one person to another, and thus to perform the office of bills and notes or of money, as the words "bearer," or "assigns," or "the holder," or the like. The courts are almost unanimous in attaching to them the attributes of commercial paper.<sup>80</sup> The same is true of interest coupons detached from such bonds.<sup>81</sup>

*Same—Bills of Lading.*

Under the law merchant, as well as by statute in some jurisdictions, a bill of lading is a receipt given by a carrier for goods bailed to it for delivery to a person named therein, called the "consignee," or his assigns. The consignee, if the goods have been sold to him, on receipt of the bill of lading, acquires a property in the goods which can only be defeated by the exercise of the vendor's equi-

<sup>79</sup> Crouch v. Credit Foncier, L. R. 8 Q. B. 374; ante, p. 527, and cases cited.

<sup>80</sup> Brainerd v. Railroad Co., 25 N. Y. 496; State v. Delafield, 2 Hill (N. Y.) 159; Bank v. Village of Rome, 19 N. Y. 20; White v. Railroad Co., 21 How. 575; Gelpcke v. City of Dubuque, 1 Wall. 175; Mercer County v. Hackett, Id. 83; Griffith v. Burden, 35 Iowa, 138; New Albany, L. & C. P. R. Co. v. Smith, 23 Ind. 353; Murray v. Lardner, 2 Wall. 110. Contra, Diamond v. Lawrence Co., 37 Pa. St. 353. In this case, however, the judge who delivered the opinion admitted that all the courts, American and English, were against him.

<sup>81</sup> Thomson v. Lee Co., 3 Wall. 327; Augusta Bank v. City of Augusta, 49 Me. 507; Haven v. Railroad Co., 109 Mass. 88.

table right of stoppage in transitu, which is the right of an unpaid vendor of goods, upon learning of the insolvency of the buyer, to retake the goods before they have reached the buyer's possession. The assignment of the bill of lading by indorsement by the consignee to a holder for value gives to the holder a better right than the consignee himself possessed. He has a title to the goods which overrides the vendor's right of stoppage in transitu, and gives him a claim to them in spite of the insolvency of the consignee and the consequent loss of the price of his goods by the consignor.<sup>22</sup> The right of the holder in this respect, however, is a right of property only. The assignment of the bill of lading gives him a right to the goods, but it did not at common law give any right to sue on the contract expressed in the bill of lading. This right is conferred by statute in most jurisdictions.

As regards the negotiability of a bill of lading, it differs in some respects from the negotiable instruments which we have heretofore discussed. Its assignment transfers rights in rem, rights to specific goods, and these, to a certain extent, wider than those possessed by the assignor. Negotiable instruments, on the contrary, merely confer rights in personam. Though the assignee of a bill of lading is relieved of one of the liabilities of the assignor,—the liability of the goods to stoppage in transitu,—he does not acquire proprietary rights independently of his assignor's title. A bill of lading which has been stolen, or which has been transferred without authority of the person really entitled, gives no rights even to a bona fide indorsee.<sup>23</sup> And, again, the contractual rights conferred by statute are, as a rule expressly conferred subject to equities. A bill of lading, then, may be called a "contract" assignable without

<sup>22</sup> *Lickbarrow v. Mason*, 1 Smith, Lead. Cas. 825; *Newhall v. Railroad Co.*, 51 Cal. 345; *Loeb v. Peters*, 63 Ala. 243.

<sup>23</sup> *Gurney v. Behrend*, 3 El. & Bl. 622; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; *Straus v. Wessel*, 30 Ohio St. 211; *Emery v. Bank*, 25 Ohio St. 300; *Shaw v. Railroad Co.*, 101 U. S. 557; *Brower v. Peabody*, 13 N. Y. 121; *Dows v. Perrin*, 16 N. Y. 325; *First Nat. Bank v. Shaw*, 61 N. Y. 283; *Tison v. Howard*, 57 Ga. 410; *Decan v. Shipper*, 35 Pa. St. 239. In some states, bills of lading are by statute made negotiable in the same manner as bills and notes, and it is held that a bona fide indorsee does not take subject to equities. *Tiedeman v. Knox*, 53 Md. 612. In other states, having similar statutes, the contrary is held. *Shaw v. Railroad Co.*, 101 U. S. 557.

notice, partaking in some respects of conveyance, inasmuch as it gives a title to property, but incapable of giving a better title, whether proprietary or contractual, than is possessed by the assignor; subject, always, to this exception: that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage in transitu, which might have been exercised against the consignee.

#### *Warehouse Receipts.*

By statute in many of the states, warehouse receipts are made assignable, and in many respects given the character of negotiable instruments.

### ASSIGNMENT BY OPERATION OF LAW.

**227.** Rules of law operate to transfer rights and liabilities arising out of a contract, under certain circumstances and to a certain extent, in the following cases:

- (a) When an interest in land is assigned, certain contractual rights and liabilities of the assignor pass to the assignee.
- (b) When a woman marries, her contractual rights and liabilities, to an extent now greatly narrowed by statute, pass to her husband. In some jurisdictions this doctrine has been virtually abolished by statute.
- (c) When a person dies, his contractual rights and liabilities pass to his executor or administrator.
- (d) The contractual rights and liabilities of a bankrupt pass to his assignee in bankruptcy.

We have thus far dealt with the manner in which the parties to a contract may by their own acts assign to others the benefits or liabilities of the contract. It remains now to show how these rights and liabilities may pass by operation of law. The cases in which such a change may result have been stated above in a general way, but each case requires special explanation.

**SAME—ASSIGNMENT OF OBLIGATIONS ON TRANSFER OF INTERESTS IN LAND.**

228. If a person, by purchase or lease, acquires an interest in land from another, on terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest will operate as a transfer of these obligations to the assignee, as follows:

**(a) Covenants affecting leasehold interests,**

- (1) If they touch and concern the thing demised, and relate to something which was in existence at the time of the lease, pass to the assignee, though not expressed to have been made with the lessee "and his assigns."
- (2) If they relate to something not in existence at the time of the lease, they pass to the assignee, if expressed as made with the lessee "and assigns."
- (3) In no case do merely personal or collateral covenants between the landlord and lessee pass to the latter's assignee.
- (4) The reversioner or landlord does not at common law, by assigning his interest in the land, convey his rights and liabilities to the assignee, but this is very generally changed by statute.

**(b) Covenants affecting freehold interests,**

- (1) If made to the owner of the land, and for his benefit, pass to his assignees, provided they touch and concern the land, and are not merely personal.
- (2) If made by the owner, restricting his enjoyment of the land, they do not, at common law, bind his assignees, except in case of

well-known interests, such as easements, recognized by law. In equity, however, it is otherwise in case of certain covenants of which the assignee had notice at the time of his purchase.

*Covenants Affecting Leasehold Interests.*

At common law, covenants affecting leasehold interests are said to "run with the land, and not with the reversion;" that is to say, they pass upon an assignment of the lease, but not upon an assignment or transfer of the reversion. If a lessee assigns his lease, the assignee, in certain cases, will be bound to the landlord by the same liabilities, and entitled to the same rights, as his assignor. The extent to which this is so may be stated thus:

(1) Covenants in a lease which "touched and concerned the thing demised" <sup>54</sup> pass to the lessee's assignee, and it is not necessary in such case that the covenants be expressed to have been made with the lessee "and his assigns." Of this class are covenants to repair, or to leave in good repair, or to deal with the land in any specified manner. Such covenants touch and concern the land, which is the thing demised. <sup>55</sup>

(2) Covenants in a lease which touch and concern the thing demised, but relate to something not in existence at the time of the lease, pass to the lessee's assignee only where the covenant is expressly made with the lessee "and assigns." <sup>56</sup>

<sup>54</sup> As to the meaning of this term, see *Masury v. Southworth*, 9 Ohio St. 341; *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 94 Ill. 83; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Peden v. Railway Co.*, 73 Iowa, 328, 35 N. W. Rep. 424; *Thaber v. Water Co.*, 30 Minn. 179, 14 N. W. Rep. 874; *Kettle R. R. Co. v. Railway Co.*, 41 Minn. 461, 43 N. W. Rep. 469; *Norfleet v. Cromwell*, 70 N. C. 634; *Pittsburg, etc., R. Co. v. Reno*, 22 Ill. App. 470; *Id.*, 123 Ill. 273, 14 N. E. Rep. 195; *Lyford v. Railroad Co.*, 92 Cal. 93, 23 Pac. Rep. 103.

<sup>55</sup> *Spencer's Case*, 1 Smith, Lead. Cas. 168, and cases collected in note; *Norman v. Wells*, *supra*; *Suydam v. Jones*, 10 Wend. (N. Y.) 180; *Leppia v. Mackey*, 31 Minn. 75, 16 N. W. Rep. 470; *Donelson v. Polk*, 64 Md. 501; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Callan v. McDaniel*, 72 Ala. 96; *Post v. Kearney*, 2 N. Y. 394; *Fitch v. Johnson*, 104 Ill. 111; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. Rep. 190.

<sup>56</sup> *Minshull v. Oakes*, 2 Hurl. & N. 808; *Spencer's Case*, 1 Smith, Lead. Cas. 68; *Hansen v. Myer*, 81 Ill. 321; *Newburg Petrol. Co. v. Weare*, 44

(3) In no case does the assignee of a lease acquire benefit or incur liability from merely personal or collateral covenants made between the lessee and landlord. For instance, where a lessee of land covenanted to use the premises as a schoolhouse, and the lessor covenanted not to build or keep any house for the sale of intoxicating liquor within a certain distance of the premises, it was held that the benefit of the lessor's covenant did not pass to the assignee of the lease.<sup>87</sup>

At common law, the assignment of his interest by the reversioner or landlord does not convey his rights and liabilities to his assignee. The law in this respect, however, was changed in England by a statute in the reign of Henry VIII.,<sup>88</sup> under which the assignee of the reversion is enabled to take the benefits and also incurs the liabilities of covenants entered into with his assignor. This statute is old enough to have become, and has become, a part of the common law in some of our states, while in others similar statutes have been enacted.<sup>89</sup> The rules as to the connection of the cove-

Ohio St. 604, 9 N. E. Rep. 845; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. Rep. 910; *Coffin v. Talman*, 8 N. Y. 465; *Tallman v. Coffin*, 4 N. Y. 134; *Masury v. Southworth*, 9 Ohio St. 340; *Dorsey v. Railroad Co.*, 58 Ill. 65; *Cronin v. Watkins*, 1 Tenn. Ch. 119; *Bream v. Dickerson*, 2 Humph. 126; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. Rep. 175.

<sup>87</sup> *Thomas v. Haywood*, L. R. 4 Exch. 311. The lessee cannot, by assigning the lease, release himself from his express covenants,—as, for instance, to pay rent,—but the landlord may still sue him thereon. He cannot escape this liability without the landlord's consent, and the latter's mere assent to the assignment does not amount to such a release. *Pfaff v. Golden*, 126 Mass. 402; *Oswald v. Fratenburgh*, 36 Minn. 270, 31 N. W. Rep. 173; *Greenleaf v. Allen*, 127 Mass. 248; *Harmony Lodge v. White*, 30 Ohio St. 569; *Harris v. Heackman*, 62 Iowa, 411, 17 N. W. Rep. 592; *Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. Rep. 705; *Ghegan v. Young*, 23 Pa. St. 18. If the landlord accepts the sublessee as his tenant, and releases the lessee, it is otherwise. But this is more than a mere assignment of the lease; it is a discharge of the old contract, and the making of a new one with the sublessee. See *Colton v. Gorham*, 72 Iowa, 324, 33 N. W. Rep. 76.

<sup>88</sup> 32 Hen. VIII. c. 34.

<sup>89</sup> *Baldwin v. Walker*, 21 Conn. 168; *Howland v. Coffin*, 12 Pick. (Mass.) 125; *Perrin v. Lepper*, 34 Mich. 295. In some of the states in which there is a statute requiring actions to be brought in the name of the real party in interest, it is held that an action on the covenants of a lease may be

nants with the thing demised apply to such as run with the reversion equally with those that run with the land; that is to say, they must "touch and concern the thing demised," and not be merely personal or collateral.<sup>90</sup>

*Covenants Affecting Freehold Interests.*

At common law, covenants entered into with the owner of land—that is to say, promises under seal made to the owner of land, and for his benefit—pass to his assignees, provided, as in other cases, they touch and concern the land conveyed, and are not merely personal.<sup>91</sup> For instance, if the vendor of land covenants with the purchaser that he has a good right to convey the land, the benefit of the covenant will pass to an assignee of the purchaser;<sup>92</sup> but it would be otherwise in case of a covenant relating to a matter purely personal between the covenantor and covenantee.<sup>93</sup>

brought by the assignee of the reverser. See *Masury v. Southworth*, 9 Ohio St. 340; *Smith v. Harrison*, 42 Ohio St. 180.

<sup>90</sup> *Spencer's Case*, 1 Smith, Lead. Cas. 163.

<sup>91</sup> ~~*Horn v. Miller*, 136 Pa. St. 640~~, 20 Atl. Rep. 706; *Kellogg v. Robinson*, 6 Vt. 276; *Peden v. Railway Co.*, 73 Iowa, 328, 35 N. W. Rep. 424; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. Rep. 190; *St. Louis Ry. Co. v. O'Baugh*, 49 Ark. 418, 5 S. W. Rep. 418; *Raby v. Reeves*, 112 N. C. 688, 16 S. E. Rep. 700; *Hallenbeck v. Kindred*, 109 N. Y. 620, 15 N. E. Rep. 887; *Scott v. Stetler*, 128 Ind. 385, 27 N. E. Rep. 721; *De Gray v. Clubhouse Co.*, 50 N. J. Eq. 329, 24 Atl. Rep. 388; *Lucas v. Turnpike Co.*, 36 W. Va. 427, 15 S. E. Rep. 182. Covenant against paramount ground rent. *Providence Life & Trust Co. v. Seidel*, 147 Pa. St. 232, 23 Atl. Rep. 560.

<sup>92</sup> *Suydam v. Jones*, 10 Wend. (N. Y.) 180; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120; *Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. Rep. 302; *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. Rep. 212; *Weed v. Larkin*, 54 Ill. 489; *Thomas v. Bland*, 91 Ky. 1, 14 S. W. Rep. 955; *Succession of Cassidy*, 40 La. Ann. 827, 5 South. Rep. 292; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. Rep. 142; *Butler v. Barnes*, 60 Conn. 170, 21 Atl. Rep. 419. But see *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. Rep. 611; *Id.*, 142 N. Y. 78, 36 N. E. Rep. 870.

<sup>93</sup> *Cole v. Hughes*, 54 N. Y. 444; *Masury v. Southworth*, 9 Ohio St. 340; *Glenn v. Canby*, 24 Md. 127; *Indianapolis Water Co. v. Nulte*, 126 Ind. 373, 26 N. E. Rep. 72; *Brewer v. Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 537; *Costigan v. Railroad Co.*, 54 N. J. Law, 233, 23 Atl. Rep. 810; *Lyford v. Railroad Co.*, 92 Cal. 93, 28 Pac. Rep. 103. It has been held that the right to reimbursement, or liability to reimburse, for instance, for the use of a party wall, under an agreement between adjoining landowners, is personal to the parties, and that it does not run with the land, so as to give a right

On the other hand, covenants entered into by the owner of land which restrict his enjoyment of the land do not, at common law, bind his assignee, except where he creates certain well-known interests, such as easements, recognized by the common law.<sup>94</sup> If a man endeavors to create restrictions on his land other than such interests, he cannot so affix them to the land as to bind subsequent owners. As said by Lord Brougham: "It must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. \* \* \* Great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote."<sup>95</sup>

*Same—In Equity.*

Courts of equity, however, have established a class of exceptions to the above rule. They have been mainly confined to covenants

to reimbursement, or to impose a liability to reimburse, to or upon the grantees of the respective parties. *Cole v. Hughes*, *supra*; *Todd v. Stokes*, 10 Pa. St. 155; *Gilbert v. Drew*, *Id.* 219; *Gibson v. Holden*, 115 Ill. 199, 3 N. E. Rep. 282; *Nalle v. Paggi* (Tex. Sup.) 9 S. W. Rep. 205; *Block v. Isham*, 28 Ind. 37. But see *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. Rep. 198; *King v. Wright*, 155 Mass. 444, 29 N. E. Rep. 644; *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. Rep. 1097. A covenant to support and care for an old man in consideration of a conveyance by him of his lands, is personal, and cannot be shifted to a purchaser of the land from the grantee. *Divan v. Loomis*, 68 Wis. 150, 31 N. W. Rep. 760. A covenant against present incumbrances does not run with the land, but is merely personal. *Guerin v. Smith*, 62 Mich. 369, 28 N. W. Rep. 906.

<sup>94</sup> *Gibson v. Porter* (Ky.) 15 S. W. Rep. 871; *Haggerty v. Lee*, 54 N. J. Law, 580, 25 Atl. Rep. 319, and 26 Atl. Rep. 537; *Costigan v. Railroad Co.*, 54 N. J. Law, 233, 23 Atl. Rep. 810.

<sup>95</sup> *Keppell v. Bailey*, 2 Mylne & K. 517. And see *Masury v. Southworth*, 9 Ohio St. 340; *Weld v. Nichols*, 17 Pick. (Mass.) 538; *Martin v. Drinan*, 128 Mass. 515; *Parish v. Whitney*, 3 Gray (Mass.) 516; *Block v. Isham*, 28 Ind. 37; *Hazlett v. Sinclair*, 76 Ind. 488; *West Virginia T. Co. v. Pipe L. Co.*, 22 W. Va. 600; *Brewer v. Cheeseman*, 18 N. J. Eq. 337; *National Bank v. Segur*, 39 N. J. Law, 184; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Dorsey v. Railroad Co.*, 58 Ill. 65; *Kennedy v. Owen*, 136 Mass. 199; *Maynard v. Polhemus* (Cal.) 15 Pac. Rep. 451; *Scott v. McMillan*, 76 N. Y. 141; *Blount v. Harvey*, 6 Jones (N. C.) 186; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. Rep. 175.



in the case of land sold for building purposes, though there seems no good reason for any limitation of the principle on which they are enforced. An illustration of this class of cases is where the vendor of land covenants that he will never use the adjoining land, retained by him, otherwise than in particular manner. Where he afterwards sells this adjoining land to one who has notice of the covenant, the latter is bound by the covenant. The principle has been thus stated: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it that the latter shall either use or abstain from using the land purchased in a particular way is what I never knew disputed.

\* \* \* It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." \*\*

\*\* *Tulk v. Moxhay*, 2 Phill. 774. And see *Columbia College v. Thacher*, 87 N. Y. 312; *Columbia College v. Lynch*, 70 N. Y. 440; *Haskell v. Wright*, 23 N. J. Eq. 389; *Stines v. Dorman*, 25 Ohio St. 580; *Thurston v. Minke*, 32 Md. 487; *DeGray v. Clubhouse Co.*, 50 N. J. Eq. 458, 24 Atl. Rep. 388; *Clark v. Martin*, 49 Pa. St. 289. A covenant, for instance, by the grantor of lots, "his heirs and assigns," not to build any improvement on the lots retained by him inferior to certain specified qualifications, binds his subsequent grantees with notice. *Halle v. Newbold*, 69 Md. 265, 14 Atl. Rep. 662. It has even been held that a covenant by a vendee of land not to sell sand therefrom, the intention being to prevent competition with the vendor, is enforceable against the covenantor's grantee buying with notice. *Hodge v. Sloan* (N. Y.) 17 N. E. Rep. 335. But in Minnesota it has been held that, though in equity covenants relating to land or its mode of use or enjoyment are frequently enforced against grantees with notice, though there is no privity of estate, and they are not such as in strict legal contemplation run with the land, an agreement for the exclusive transportation of the products of land by a railroad to be extended or built over it, is not one which will be so enforced. *Kettle R. R. Co. v. Railway Co.*, 41 Minn. 461, 43 N. W. Rep. 460.

**ASSIGNMENT OF CONTRACTUAL OBLIGATION BY  
MARRIAGE.**

**229.** At common law, on the marriage of a woman who has entered into a contract while a feme sole, she loses the right to sue on the contract during coverture, and her husband acquires the benefit of the contract, or the chose in action, if he reduces it to his possession.

**230.** A married woman during coverture is not liable at common law on a contract made while a feme sole, as her liabilities pass with some limitations to her husband. He may be sued thereon jointly with her.

**231.** These rules are greatly changed by statute in most jurisdictions, and in some are virtually abolished.

At common law, a married woman who has entered into a contract while a feme sole, and is entitled thereby to benefits or subject to liabilities, is disabled by her marriage from acquiring such benefits, and is relieved from such liabilities. She is disabled from acquiring the benefits of the contract, because she cannot sue upon them apart from her husband, and she may lose them altogether, for they are vested conditionally in the husband. He may take them to himself by doing any act which amounts to a reduction into possession of the chose in action. He may, for instance, reduce to his possession the benefits of a contract under which money is due his wife by receiving, or authorizing another to receive, the payments. He may also sue jointly with his wife for what is due on her contracts. Whatever is thus obtained passes absolutely to him, like all other personal property of which the wife was possessed. If the husband does not thus reduce his wife's choses in action into his possession during the coverture, they survive to her if he dies first, or pass to her representatives if she dies in his lifetime.

At common law, the husband acquires the liabilities of the wife to the extent that he may be sued jointly with her on any contracts made by her before marriage.

*Statutory Changes in the Law.*

In England and in all of our states the common law in this respect has been very greatly changed by statute. In some states it has been virtually abolished and in these states the marriage of a woman does not in any way affect her rights or liabilities under contracts entered into before marriage.

**ASSIGNMENT OF CONTRACTUAL OBLIGATION BY DEATH.**

**232.** Death passes to the executors or administrators of the deceased all rights of action in respect of the personal estate and all liabilities chargeable upon it. This does not include—

**EXCEPTIONS—**(a) Contracts depending on the personal services or skill of the deceased.

(b) Contracts the breach of which involves a purely personal loss.

**233.** Executors and administrators take no benefit by such an assignment of contracts, nor are they rendered personally liable thereby. They merely represent the original contracting party to the extent of his estate, and no more.

On the death of a person all his personal estate passes, by operation of law, to his executors or administrators, and with it also pass all rights of action on contract which will affect such estate, and all liabilities arising out of contract which are chargeable upon it;<sup>97</sup> and actions on such contracts are brought by or against the personal representative in his own name.<sup>98</sup> Covenants, for instance, which are attached to a leasehold estate, pass, as to benefit and liability, with the personalty to the executor or administrator; but covenants affecting freehold estates, such as covenants for

<sup>97</sup> *Jewett v. Smith*, 12 Mass. 309; *Snodgrass v. Cabiness*, 15 Ala. 160; *Henderson v. Henshall*, 4 C. C. A. 357, 54 Fed. Rep. 320; *Beecher v. Buckingham*, 18 Conn. 110; *Shirley v. Healds*, 84 N. H. 407. This subject is covered by statute in most of the states.

<sup>98</sup> *Potter v. Van Vranken*, 36 N. Y. 619.

title in a conveyance of freehold property, pass to the heir or devisee of the realty.

This rule does not include such contracts as depend upon the personal services or the skill of the deceased. The executors or administrators cannot be required to perform such contracts, nor can they insist upon offering such performance. Contracts for personal service expire on the death of either of the parties. An apprenticeship contract is thus terminated by the death of the master, and no claim to the services of the apprentice survives to the executor or administrator." In like manner, breach of a contract which involves a purely personal loss does not confer a right of action upon executors or administrators. Thus, where an executor sued for a breach of promise to marry his testatrix, the promise having been broken, and the right of action having accrued in her lifetime, it was held that he could not recover, as it did not clearly appear that the breach of contract had resulted in damage to the personal estate. "Although marriage," it was said, "may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered in this case as an increase of the individual transmissible personal estate."<sup>100</sup>

Executors and administrators take no personal benefit from the contracts of the decedent, nor are they personally liable. They merely stand in his shoes, and represent him to the extent of his estate.

#### JOINT AND SEVERAL CONTRACTS.

**234. A contract in which there are two or more parties on either or both sides may be—**

- (a) Joint; that is, the respective parties may be jointly entitled, or jointly liable in respect of the same matter or debt.

<sup>99</sup> *Baxter v. Burfield*, 2 Strange, 1266.

<sup>100</sup> *Chamberlain v. Williamson*, 2 Maule & S. 408. And see *Stebbins v. Palmer*, 1 Pick. (Mass.) 71; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Chase v. Fitz*, 132 Mass. 359; *Wade v. Kalbfleisch*, 58 N. Y. 282; *Hovey v. Page*, 55 Me. 142; *Lattimore v. Simmons*, 13 Serg. & R. (Pa.) 183; *Grubb v. Sult*, 32 Grat. (Va.) 203.

- (b) **Several; that is, the respective parties may be separately liable or separately entitled for or to the whole of the same debt or performance.**
- (c) **Joint and several; that is, the promisors may be either jointly or severally liable, at the election of the promisee. Several promisees, it seems, cannot be both jointly and severally entitled.**

Where several persons enter into a contract on the same side, either as promisors or promisees, they may do so jointly as one party, or severally as distinct parties entering into several contracts, or, in the case of the persons bound, jointly and severally, making a joint contract and several distinct contracts at the same time. Whether the contract is joint or several, or both joint and several, depends upon the intention of the parties, as manifested in the evidence of the contract. There are a number of rules for construing contracts, and determining this intention; but we must postpone their consideration until we come to treat of the interpretation of contracts.<sup>101</sup> We can only deal here with the rules that govern the operation of the contract after such intention has been determined.

The rules which we shall state are the rules of the common law. It is never safe to assume that they are still in force in any particular jurisdiction, for they have been very much modified by statute. We cannot attempt to set out these statutes, nor even to show all the changes which they have made in the common law. Attention will be called to the most important changes, and for the rest the student must consult the statutes of his state.

#### **SAME—JOINT CONTRACTS.**

**235. Where several parties join in a promise.**

- (a) **They are each liable for the whole debt or performance.**
- (b) **They are jointly, and not separately, liable, and must all be sued jointly, if alive and within the**

<sup>101</sup> Post, p. 683.

jurisdiction of the court; but a failure to join them all is waived unless objection is made by demurrer or plea in abatement.

- (c) Where one of them dies, the liability at common law, but not in equity, devolves upon the survivors, and, on the death of all, upon the personal representative of the last survivor.
- (d) A release of one of them by operation of law, as by discharge in bankruptcy, by the statute of limitations, etc., does not release the others; but a release of one by act of the promisee, releases all.

**236. Where a promise is made to several jointly.**

- (a) They are entitled jointly, and not separately, and must join in a suit on the promise.
- (b) Where one of them dies, the legal right devolves upon the survivors, and on them alone.

Several persons may join in a contract on one side or the other, or there may be several persons on both sides. In other words, in respect of the same debt or liability, more persons than one may be joined in the character of creditor or promisee, or more persons than one in the character of debtor or promisor, or more persons than one in both characters. In these cases the contract is said to be a joint contract or joint debt, and the persons composing the respective parties thereto are called "joint creditors" or "joint promisees," and "joint debtors" or "joint promisors."

*Joint Debtors or Promisors.*

If several persons make a joint promise, each is liable to the promisee or creditor for the whole debt or liability, notwithstanding the fact that they are both liable. Neither is bound by himself, but each one of them is bound to the full extent of the promise. If both are living and within the jurisdiction of the court, they should all be joined as defendants in an action on the contract.<sup>102</sup>

<sup>102</sup> *Smith v. Miller*, 49 N. J. Law, 521, 13 Atl. Rep. 39; *Lodge v. Dicas*, 8 Barn. & Ald. 611; *Eller v. Lacy* (Ind. Sup.) 36 N. E. Rep. 1088; *Field v. Runk*, 22 N. J. Law, 525; *Van Leyen v. Wreford*, 81 Mich. 606, 45 N. W.

If one of them is sued alone, he is not bound to answer to the merits of the action without the others being sued with him. He may demur if the defect appears on the face of the pleading, or plead in abatement if it does not so appear.<sup>103</sup> This is the only way in which he can raise the objection. If he pleads to the merits, he cannot object that others were jointly liable with him; for, when two are jointly bound in one bond or on one promise, though neither of them is bound by himself, yet neither of them can say that it is not his deed or promise.<sup>104</sup> Each party, therefore, to a joint contract, is severally liable in the sense that if he is sued separately, and does not plead in abatement, or, in a proper case, demur, he becomes liable to the creditor for the entire debt.<sup>105</sup>

Rep. 1116; *Ripley v. Crooker*, 47 Me. 370; *Walker v. Bank*, 5 C. C. A. 421, 56 Fed. Rep. 76; *Allin v. Shadburne*, 1 Dana (Ky.) 68; *O'Brien v. Bound*, 2 Speer (S. C.) 495; *McCall v. Price*, 1 McCord (S. C.) 82. An understanding between the promisors themselves that one of them shall pay or perform the whole debt or promise does not affect the rule. *Lodge v. Dicus*, *supra*. A familiar illustration of joint promises is in the case of partnership debts. You cannot sue less than all the partners. You must sue the whole firm. In some of the states it is provided by statute that all contracts which by common law are joint only shall be construed to be joint and several. *Belleville Bank v. Winslow*, 30 Fed. Rep. 488; *Wibaux v. Live Stock Co.*, 9 Mont. 154, 22 Pac. Rep. 492. And in other states statutes having substantially the same effect have been enacted.

<sup>103</sup> *Rice v. Shute*, 5 Burrows, 2611; *State v. Chandler*, 79 Me. 172, 8 Atl. Rep. 553; *Nash v. Skinner*, 12 Vt. 219; *Smith v. Miller*, 49 N. J. Law. 521, 13 Atl. Rep. 39; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169; *Bledsoe v. Irvin*, 35 Ind. 293; *Henderson v. Hammond*, 19 Ala. 340; *Potter v. McCoy*, 26 Pa. St. 458.

<sup>104</sup> *Whelpdale's Case*, 5 Coke, 119; *Rice v. Shute*, 5 Burrows, 2613.

<sup>105</sup> *Rice v. Shute*, 5 Burrows, 2611; *Richards v. Heather*, 1 Barn. & Ald. 29; *Abbot v. Smith*, 2 W. Bl. 947; *King v. Hoare*, 13 Mees. & W. 494; *Willson v. McCormick*, 86 Va. 995, 11 S. E. Rep. 976; *Elder v. Thompson*, 13 Gray (Mass.) 91; *Maurer v. Midway*, 25 Neb. 575, 41 N. W. Rep. 395; *Mountstephen v. Brooke*, 1 Barn. & Ald. 224; *First Nat. Bank v. Hamor*, 7 U. S. App. 69, 1 C. C. A. 153, 49 Fed. Rep. 45; *Nash v. Skinner*, 12 Vt. 219; *Davis v. Chouteau*, 32 Minn. 548, 21 N. W. Rep. 748; *Sandwich Manuf'g Co. v. Kimberly*, 37 Minn. 214, 33 N. W. Rep. 782; *Hicks v. Cram*, 17 Vt. 449; *Beeler v. Bank*, 34 Neb. 348, 51 N. W. Rep. 857; *Lieberman v. Brothers* (N. J. Sup.) 26 Atl. Rep. 828; *Coon v. Anderson* (Mich.) 59 N. W. Rep. 607. Where the joint debtors are sued jointly, and a joint judgment recovered, the whole amount of the judgment may be levied against one separately. Each joint debtor,

Where one of the joint debtors is dead, or without the jurisdiction of the court, or has been discharged from the debt by bankruptcy or insolvency proceedings, or where he has exercised a right, because of infancy or otherwise, to avoid the contract, or the debt is barred as against him by the statute of limitations, the other debtor or debtors may be sued without joining him.<sup>106</sup>

*Same—Survivorship.*

Upon the death of one of several joint debtors or promisors, the liability at common law devolves upon the survivors. The personal representative of the deceased debtor cannot be sued jointly with the survivors. The whole liability, in this way, ultimately devolves upon the last surviving debtor, and, after his death, upon his representative.<sup>107</sup> This rule, however, only applies at common law. The estate of a deceased joint debtor may be charged in equity, unless he was merely a surety, and received no benefit from the contract.<sup>108</sup>

*Same—Release.*

At common law, a release of one joint debtor by operation of law—as by a discharge in bankruptcy or insolvency, or a discharge by the exercise of a right, because of infancy, for instance, to avoid the contract, or a discharge by operation of the statute of limita-

therefore, becomes ultimately liable to his creditor for the whole, and not only for his proportionate part, of the debt. *Bird v. Randall*, 1 W. Bl. 388. Where a judgment is thus obtained against less than all the joint debtors, it merges or extinguishes the right of action as against all. Suit cannot afterwards be brought against the others. They are entirely relieved from liability. *Mason v. Eldred*, 6 Wall. 231.

<sup>106</sup> *Leake*, Cont. 214.

<sup>107</sup> *Richards v. Heather*, 1 Barn. & Ald. 20; *Gere v. Clark*, 6 Hill (N. Y.) 350; *Brown v. Benight*, 3 Blackf. (Ind.) 37; *Foster v. Hooper*, 2 Mass. 572; *Stevens v. Catlin*, 44 Ill. App. 114; *Id.* (Ill. Sup.) 37 N. E. Rep. 1023; *Hoskinson v. Elliott*, 62 Pa. St. 393; *Atwell v. Milton*, 4 Hen. & M. (Va.) 253; *Clark v. Parish*, 1 Bibb. (Ky.) 547. As to the effect of the death of a joint debtor after judgment, see *Leake*, Cont. 215; *Harbart's Case*, 3 Coke, 14a. The doctrine of survivorship is virtually abolished by statute in most states. *Taylor v. Taylor*, 5 Humph. (Tenn.) 110; *Williams v. Bradley*, 5 Ohio Cir. Ct. R. 114; *Fisher v. Chadwick* (Wyo.) 34 Pac. Rep. 899; *Bachelor v. Fiske*, 17 Mass. 464.

<sup>108</sup> *Davis v. Van Buren*, 72 N. Y. 587; *Richardson v. Draper*, 87 N. Y. 337.



tions—does not affect the liability of the others.<sup>109</sup> It is otherwise, however, where the release is by an act of the creditor. In the latter case the other debtors are discharged.<sup>110</sup> A mere covenant not to sue one joint debtor, it seems, does not operate as a discharge of the others.<sup>111</sup>

*Joint Creditors or Promisees.*

Where the contract is joint on the part of the promisees or creditors, all of them must join in suing upon it.<sup>112</sup> Even a disclaimer by one of them, if without the assent of the promisor, will not entitle the others to sue alone.<sup>113</sup> If one of them is not joined as a plaintiff, the defendant may plead in abatement; but failure to do so, unlike the case of nonjoinder of joint debtors, will not constitute a waiver of the defect.<sup>114</sup>

<sup>109</sup> Ante, p. 557.

<sup>110</sup> *Brooks v. Stuart*, 9 Adol. & E. 854; *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 437; *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207; *Shaw v. Pratt*, 22 Pick. (Mass.) 308; *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. Rep. 534; *Goldbeck v. Bank*, 147 Pa. St. 267, 23 Atl. Rep. 565; *Lunt v. Stevens*, 24 Me. 534; *Allin v. Shadburne*, 1 Dana (Ky.) 68; *Wiggin v. Tudor*, 23 Pick. (Mass.) 434; *Newcomb v. Raynor*, 21 Wend. (N. Y.) 108. This is changed by statute in some states.

<sup>111</sup> *Clayton v. Kynaston*, 2 Salk. 573; *Shed v. Pierce*, 17 Mass. 628; *Couch v. Mills*, 21 Wend. (N. Y.) 424; *Walker v. McCulloch*, 4 Greenl. (Me.) 421; *McLellan v. Bank*, 24 Me. 566; *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207.

<sup>112</sup> *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Hatsall v. Griffith*, 2 Crompt. & M. 679; *Pease v. Hirst*, 10 Barn. & C. 122; *Angus v. Robinson*, 59 Vt. 585, 8 Atl. Rep. 497; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; *Henry v. Mt. Pleasant*, 70 Mo. 500; *Halliday v. Doggett*, 6 Pick. (Mass.) 359; *Gould v. Gould*, 6 Wend. (N. Y.) 263; *Hewes v. Bayley*, 20 Pick. (Mass.) 96; *Cannon v. Maull*, 4 Har. (Del.) 223; *Archer v. Bogue*, 3 Scam. (Ill.) 526; *Wilson v. Wallace*, 8 Serg. & R. (Pa.) 53.

<sup>113</sup> *Wetherell v. Langston*, 1 Exch. 634; *Angus v. Robinson*, *supra*; *Whart. Cont.* 814, and cases cited.

<sup>114</sup> If one of the joint promisees is omitted, and the defect appears upon the record, it may be objected to by demurrer, or by motion in arrest of judgment, or by error. *Petrie v. Bury*, 3 Barn. & C. 353; *Pugh v. Stringfield*, 3 C. B. (N. S.) 2; *Wetherell v. Langston*, 1 Exch. 634; *Davis v. Chouteau*, 32 Minn. 548, 21 N. W. Rep. 748; *Ehle v. Purdy*, 6 Wend. (N. Y.) 629; *Baker v. Jewell*, 6 Mass. 460; *Beach v. Hotchkiss*, 2 Conn. 697; *Wiggin v. Cumings*, 8 Allen (Mass.) 353. If the defect does not appear upon the record, there would be a variance between the contract as pleaded and proved, which, unless amended, would be fatal. *Chanter v. Leese*, 4 Mees. & W. 295.

*Same—Survivorship.*

Where one of several joint creditors or promisees dies, the legal right under the contract devolves upon the survivors, and they only can sue on the contract. The representative of the deceased creditor cannot be joined, nor can he sue alone.<sup>116</sup>

*Same—Release.*

A payment of the debt to one of several joint promisees is a discharge of the debt. So, also, one of the promisees, without the others joining, may give a valid release of the debt, and it will bind the others.<sup>118</sup>

## SAME—SEVERAL CONTRACTS.

**237.** If two or more parties bind themselves severally to another in respect of the same matter or debt,

(a) Their liability is separate and distinct, and they cannot be sued jointly.

(b) The payment or discharge of one of the contracts discharges all.

**238.** If one party binds himself to several parties severally, their right to enforce the promise is separate, and they cannot join in suing thereon.

On the other hand, several persons may contract separately respecting the same matter. Several persons may bind themselves severally to another in respect of the same matter or debt, so that the creditor is entitled to claim the whole debt or performance against each debtor separately;<sup>117</sup> or one person may bind himself to each of several persons in respect of the same matter or debt, so

<sup>116</sup> *Martin v. Crump*, 2 Salk. 444; *Anderson v. Martindale*, 1 East, 497; *Peters v. Davis*, 7 Mass. 257; *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Burnside v. Merrick*, 4 Metc. (Mass.) 537; *Murphy v. Bank*, 5 Ala. 421.

<sup>118</sup> *Rawstorne v. Gandell*, 15 Mees. & W. 304; *Wilkinson v. Lindo*, 7 Mees. & W. 81; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Tuckerman v. Newhall*, 17 Mass. 581; *Bruen v. Marquard*, 17 Johns. (N. Y.) 58; *Pierson v. Hocker*, 3 Johns. (N. Y.) 68; *Napier v. McLeod*, 9 Wend. (N. Y.) 120.

<sup>117</sup> *Lurton v. Gilmiam*, 1 Scam. (Ill.) 577.

that each creditor is separately entitled to claim the whole debt or performance.<sup>118</sup>

Where the promises are several in respect of the promisors, they must be sued separately; they cannot be sued jointly. And where the promises are several in respect of the promisees, they must sue separately.<sup>119</sup>

The peculiar characteristic of several contracts is the identity of the debt or matter of the different contracts; so the payment or discharge of one of the contracts discharges all. A frequent use of this mode of contracting occurs in guaranties, where a principal debtor and sureties become severally bound to the creditor for the debt or matter guarantied. The creditor may sue one of them alone for the whole amount of the debt, and payment of one will discharge all as against the creditor. As between themselves, however, as we shall see, the sureties who are compelled to pay may be entitled to recover the amount from the principal debtor, or a proportionate amount of it from the other sureties.<sup>120</sup>

Where the promisors are severally liable, and therefore, of course, where they are both jointly and severally liable, a judgment against less than all of them does not discharge the others until it has been satisfied.<sup>121</sup>

### *Survivorship.*

The doctrine of survivorship applicable to joint contracts does not apply to several contracts.<sup>122</sup>

<sup>118</sup> Leake, Cont. 216; Burton v. Henry, 90 Ala. 281, 7 South. Rep. 925; Borabacher v. Lee, 16 Mich. 169; Hall v. Leigh, 8 Cranch, 50; Chanter v. Leese, 4 Mees. & W. 295; Geer v. School Dist., 6 Vt. 76; Catawissa R. Co. v. Titus, 49 Pa. St. 277; Yates v. Foot, 12 Johns. (N. Y.) 1.

<sup>119</sup> Davis v. Belford, 70 Mich. 120, 37 N. W. Rep. 919; Price v. Railroad Co., 18 Ind. 137; Sims v. Clark, 91 Ga. 302, 18 S. E. Rep. 158. This is changed by statute in most states. See Steffes v. Lemke, 40 Minn. 27, 41 N. W. Rep. 302; Wibaux v. Live-Stock Co., 9 Mont. 154, 22 Pac. Rep. 492; Brown v. Walker, 108 N. C. 387, 13 S. E. Rep. 8; Wallis v. Carpenter, 13 Allen (Mass.) 19; Costigan v. Lunt, 104 Mass. 217.

<sup>120</sup> Post, p. 562.

<sup>121</sup> Ward v. Johnson, 13 Mass. 148; Harlan v. Berry, 4 G. Greene (Iowa) 212.

<sup>122</sup> Enys v. Donnithorne, 2 Burrows, 1190; Carthrae v. Brown, 3 Leigh (Va.)

**SAME—CONTRACTS BOTH JOINT AND SEVERAL.**

**239.** Where a contract in respect of the promisors is both joint and several.

(a) The promisee may sue all the promisors jointly, or each one separately.

(b) If he sues jointly, he must sue all the promisors; he cannot sue less than all jointly.

Again, several persons may enter into concurrent contracts respecting the same matter, binding themselves jointly as one party, and also severally as separate parties, at the same time, in which case, besides the one joint contract, there are also as many several contracts as there are separate persons; the debt or matter of the contract being the same in all the contracts thus made. Such a contract is joint and several. A joint and several note, for instance, by several makers, is equivalent to a joint note, and as many distinct separate notes as there are makers.<sup>123</sup>

Where the contract is both joint and several, the promisee may, at his election, either sue all the promisors jointly, or each one of them separately.<sup>124</sup> He must do one or the other. He cannot sue less than all of them jointly. If there are three promisors, he cannot sue two jointly, but must sue them all.<sup>125</sup> Of course, as already shown, a failure of those sued to plead in abatement because of the nonjoinder of others will waive the defect, and entitle the plaintiff to judgment against those sued.<sup>126</sup>

It seems that a contract cannot be so made in respect of one and the same matter as to entitle several persons under it both jointly and severally. They must either be entitled under it jointly only, or severally only.<sup>127</sup>

<sup>123</sup> *Leake*, Cont. 217; *Beecham v. Smith*, El., Bl. & El. 442; *Hemmenway v. Stone*, 7 Mass. 54; *Klapp v. Kleckner*, 3 Watts & S. (Pa.) 519.

<sup>124</sup> *Schilling v. Black*, 49 Kan. 552, 31 Pac. Rep. 143; *Carter v. Carter*, 2 Day (Conn.) 442.

<sup>125</sup> *State v. Chandler*, 79 Me. 172, 8 Atl. Rep. 553.

<sup>126</sup> *Ante*, p. 556.

<sup>127</sup> *Slingsby's Case*, 5 Coke, 18b; *Bradburne v. Botfield*, 14 Mees. & W. 573; *Keightley v. Watson*, 3 Exch. 723.

*Survivorship.*

As we have seen, the doctrine of survivorship does not apply to several contracts. It necessarily follows that it does not apply to joint and several contracts.

**SAME—CONTRIBUTION BETWEEN JOINT DEBTORS.**

240. Where one of several joint debtors pays the whole debt, he may, in the absence of an agreement to the contrary, enforce contribution from the others; that is, he may recover from them their proportionate share of the debt.

The rights and liabilities of persons who have contracted jointly or severally respecting the same matter as between themselves depend upon the relation in which they stand, and the agreement or understanding upon which they have joined in the contract. In general, the contract itself is independent of such relation or agreement. In contracts of guaranty or suretyship, for instance, made between the creditor and the principal debtor and his sureties, the principal debtor and the sureties are usually all made debtors in equal degree to the creditor, who may recover the whole debt against all or any of them. As between themselves, however, the principal debtor is solely liable; and, if the surety is called upon by the creditor to pay any part of the debt, he may, upon payment, recover the amount from the principal debtor. So, where there are several sureties, who are all primarily liable for the whole debt to the creditor, and one of them is called upon to pay, each of the cosureties becomes ratably indebted to him for contribution.<sup>122</sup> This rule is not limited to contribution between sureties, but applies to joint contractors generally. Where one of them is com-

<sup>122</sup> Post, p. 700; *Bushnell v. Bushnell*, 77 Wis. 435, 46 N. W. Rep. 442; *Jackson v. Murray*, 77 Tex. 644, 14 S. W. Rep. 235; *Kemp v. Fender*, 12 Mees. & W. 421; *Taylor v. Savage*, 12 Mass. 98; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Fletcher v. Grover*, 11 N. H. 368. The quasi contract for contribution is a several and not a joint contract. A surety therefore may enforce contribution against the estate of a deceased cosurety. *Bachelor v. Flake*, 17 Mass. 464; *Handley v. Heflin*, 84 Ala. 600, 4 South. Rep. 725.

pelled to pay the whole debt, the law, as we shall see in treating of quasi contracts, creates a promise on the part of the others to pay him their proportion, and he may sue them thereon.<sup>120</sup> This doctrine of contribution applies where the contract is joint, or both joint and several, but not where it is several only. Formerly the right to contribution could only be enforced in equity, but now, except as between sureties, it may be enforced at law, as well as in equity. In some jurisdictions contribution between sureties can still be enforced in equity only, except where a statute provides otherwise.<sup>120</sup>

The principal contract may in some cases be affected by the rights and relations of the several parties who join in it. For instance, in contracts of guaranty or suretyship, the creditor is bound, upon principles of equity, to abstain from any dealing with the debtor which may prejudice the surety. If he binds himself to give further time to the debtor, without the consent of the surety, the latter is discharged.<sup>121</sup>

<sup>120</sup> *Doremus v. Selden*, 19 Johns. (N. Y.) 213; *Sears v. Starbird*, 78 Cal. 225, 20 Pac. Rep. 547; *Fletcher v. Grover*, 11 N. H. 368; *Foster v. Burton*, 62 Vt. 239, 20 Atl. Rep. 326; *Logan v. Trayser*, 77 Wis. 579, 46 N. W. Rep. 877.

<sup>120</sup> *Longley v. Griggs*, 10 Pick. (Mass.) 121; *McDonald v. Magruder*, 3 Pet. 470.

<sup>121</sup> *Rees v. Berrington*, 2 Ves. Jr. 540; *Pooley v. Harradine*, 7 El. & Bl. 431; *Gordon v. Bank*, 144 U. S. 97, 12 Sup. Ct. Rep. 657; *Chemical Co. v. Pegram*, 112 N. C. 614, 17 S. E. Rep. 298.

## CHAPTER X.

### INTERPRETATION OF CONTRACT.

- 240-244. Rules Relating to Evidence—In General—Parol Evidence.
- 245-246. Proof of Document.
- 247. Evidence as to Fact of Agreement.
- 248. Evidence as to Terms of Contract.
- 249-250. Rules of Construction—General Rules.
- 251. Rules as to Time.
- 252-253. Rules as to Penalties and Liquidated Damages.
- 254. Joint and Several Contracts.

We have considered the elements necessary to the formation and existence of a contract, and the operation of a contract when formed. The next thing to be considered is the mode in which the courts deal with a contract when it comes before them in litigation, or the interpretation of contracts. In considering this question we have to learn how the existence and the terms of a contract are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; and what rules have been adopted for construing the meaning of the terms when fully before the court. The subject, therefore, divides itself into (1) rules relating to evidence, and (2) rules relating to construction. Under the first head we have to consider the sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention. Under the second we have to consider the rules which exist for construing that intention from expressions ascertained to have been used.

#### RULES RELATING TO EVIDENCE—IN GENERAL—PAROL EVIDENCE.

240. The circumstances under which an alleged contract was made, what was said and done by the parties, and their intention to contract, are questions of fact for the jury. Whether what was said and done amounts to a contract, and its effect, are questions of law for the court.

241. Where a man is proved to have made a contract by word of mouth upon certain terms, he cannot say he did not mean what he said.

242. A contract, or portion thereof, reduced to writing, cannot be altered by parol evidence.

243. If a contract is under seal, the instrument itself is the contract, and its production proves the contract.

244. A writing not under seal, whether required by the statute of frauds or not, is not itself the contract, but only evidence of the contract, so that a simple contract may have to be proved by writing, or by proof of words or acts, or partly by one and partly by the other.

If a dispute arises as to the terms of a contract made by word of mouth or by acts, or partly by both, it is necessary, in the first instance, to ascertain what was said or done, and the circumstances under which the supposed contract was formed. These are questions of fact to be determined by the jury from the evidence adduced before them. When a jury has found, as a matter of fact, what the parties said and did, and that they intended to enter into a contract, it is for the court to say whether what they have said or done amounts to a contract, and what is its effect.

When a person is proved to have made a contract by word of mouth or by conduct upon certain terms, he cannot be heard to say that he did not mean what he said or did. As we have said in speaking of the nature of contract, the state of mind or intention of a person, being impalpable, can be ascertained only by means of outward expressions, such as words and acts. Accordingly, the law judges of the state of mind or intention of a person by outward expressions only, and excludes all questions concerning intention unexpressed. It imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words; and not only of his words, but of his actions as well; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to agree in regard to some matter, that agreement is established in law as a fact by proof of that con-



duct, whatever may be the real but unexpressed state of his mind on the matter. In judging of intention from a person's words and conduct, where his acts are inconsistent with his words, the former are, in general, accepted as the more reliable guide to the intention; and the conduct may in some cases determine the intention even in opposition to the words.<sup>1</sup>

The principle above stated applies also to contracts made in writing. Where parties have put into writing any portion of the terms of their agreement, they cannot alter by parol evidence that which is written; and, where the writing purports to be the whole of the agreement, it can neither be added to nor varied by parol evidence of their unexpressed intention.<sup>2</sup>

It is not necessary for us to discuss the rules of evidence as regards purely oral contracts, for proof of a contract made by word of mouth is a part of the general law of evidence. Our consideration of the rules of evidence will therefore be confined to their effect upon written contracts and contracts under seal.

Admissible evidence extrinsic to such contracts falls under three heads: (1) Evidence as to the fact that there is a document purporting to be a contract, or part of a contract. (2) Evidence that the professed contract is in fact what it professes to be. It may lack some element necessary to the formation of contract, or be subject to some parol condition upon which its existence as a contract depends. (3) Evidence as to the terms of the contract. These may require illustration which necessitates some extrinsic evidence; or they may be ambiguous, and then may be in like manner explained; or they may comprise, unexpressed, a custom or usage the nature and effect of which have to be proved.

#### *Difference between Formal and Simple Contracts.*

Before taking up these questions as to the admissibility of evidence it will be well to note the difference between contracts under seal and simple contracts in writing, as illustrated by the rules of

<sup>1</sup> Leake, Cont. 8.

<sup>2</sup> Packer v. Roberts, 140 Ill. 9, 29 N. E. Rep. 668; Rigdon v. Conley, 141 Ill. 565, 30 N. E. Rep. 1000; Davis v. Shafer, 50 Fed. Rep. 764; Hunt v. Hunter, 52 Mo. App. 263; Jones v. Swearingen (S. C.) 19 S. E. Rep. 947; Baugh v. White, 161 Pa. St. 632, 29 Atl. Rep. 207. And see the cases hereinafter cited.

evidence respecting them. A contract under seal, as we have seen, derives its validity from the form in which it finds expression; therefore, if the instrument is proved, the contract is proved, unless it can be shown to have been executed under such circumstances as preclude the formation of contract, or to have been delivered to a third person under conditions which have remained unfulfilled, so that the deed is no more than an escrow. A written contract not under seal, however, is not the contract itself, but only evidence of the contract,—a record of the contract.<sup>3</sup> Even where statutory requirements for writing exist, as under the statute of frauds, the writing is nothing more than evidence of the agreement. A written offer containing all the terms of the contract, signed by the proposer, and accepted by the other party by performance on his part, is enough to enable the latter to sue under the statute of frauds. And where there is no such necessity for writing, it is optional with the parties to express their agreement by word of mouth, by action, or by writing, or partly by one and partly by another of these processes. It is always possible, therefore, that a simple contract may have to be sought for in the words and acts, as well as in the writing, of the contracting parties. But in so far as they have reduced their meaning to writing they cannot adduce evidence in contradiction or alteration of it. They put on paper what is to bind them, and so make the written document conclusive evidence against them.<sup>4</sup>

#### SAME—PROOF OF DOCUMENT.

**245. A contract under seal is proven by evidence of the sealing and delivery.**

**246. In proving a simple contract evidenced by a document, parol evidence is admissible for the following purposes:**

- (a) To show that the defendant is the person who made the contract.
- (b) To supplement the writing where it only constitutes a part of the contract.

<sup>3</sup> Wake v. Harrop, 6 Hurl. & N. 768.

<sup>4</sup> Id.

(c) To connect several documents which together show the contract, except—

**EXCEPTION**—Where the contract is within the the statute of frauds.

### *Contracts under Seal.*

A contract under seal is proved by evidence of the sealing and delivery. At common law it is necessary to call one of the attesting witnesses where a contract under seal is attested;<sup>6</sup> but by statute in many jurisdictions this is no longer necessary. Where the attesting witnesses are dead, or without the jurisdiction of the court, or are for any other reason incapable of testifying, the sealing and delivery of the deed is sufficiently shown by proof of their handwriting.<sup>6</sup> In a number of states it has been considered that proof of the handwriting of the grantor or obligor furnishes more satisfactory evidence of its execution than proof of the handwriting of the subscribing witness, and such proof has been held sufficient, except in the case of instruments which the law requires to be attested by witnesses.<sup>7</sup>

### *Simple Contracts.*

In proving a simple contract, whether in writing or not, parol evidence is always necessary to show that the party sued is the party who made the contract and is bound by it. In no other way could this be shown.

Oral evidence must of course supplement the writing where the writing only constitutes a part of the contract. For instance, if a person writes another that he will give the latter a certain sum

<sup>6</sup> *Burke v. Miller*, 7 Cush. (Mass.) 547; *Henry v. Bishop*, 2 Wend. (N. Y.) 575; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Hess v. Griggs*, 43 Mich. 397, 5 N. W. Rep. 427; *McAdams v. Stillwell*, 13 Pa. St. 90; *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Barry v. Ryan*, 4 Gray (Mass.) 523; *Melcher v. Flanders*, 40 N. H. 139; *Jackson v. Sheldon*, 22 Me. 509; *Dorr v. School Dist.*, 40 Ark. 237.

<sup>6</sup> *Valentine v. Piper*, 22 Pick. (Mass.) 85; *Beattie v. Hilliard*, 55 N. H. 428; *Dunbar v. Marden*, 13 N. H. 311; *Davis v. Higgins*, 91 N. C. 382; *Richards v. Skiff*, 8 Ohio St. 586; *Elllott v. Dycke*, 78 Ala. 150.

<sup>7</sup> *Newsom v. Luster*, 13 Ill. 175; *Cox v. Davis*, 17 Ala. 714; *Woodman v. Segar*, 25 Me. 90; *Valentine v. Piper*, 22 Pick. (Mass.) 85; *Landers v. Bolton*, 26 Cal. 393.

for an article, and tells him to ship it if he accepts the offer, parol evidence of the shipment would be necessary to prove conclusion of the contract. And so, if a person puts the terms of an agreement into a written offer which the other party accepts by word of mouth, or if, where no writing is necessary, he puts part of the terms into writing, and arranges the rest by parol with the other party, oral evidence must be given in both cases to show that the contract was concluded upon those terms by the acceptance of the other party.<sup>8</sup>

So, also, where the evidence of a contract consists of several documents which do not on their face show their connection with each other, parol evidence is admissible to show their connection,<sup>9</sup> except in the case of contracts which the statute of frauds requires to be expressed in writing. In the latter case, as we have seen, the statute requires written evidence as to the whole of the contract, and the several documents constituting its evidence must need no oral evidence to connect them.<sup>10</sup> This requirement, however, does not apply to contracts which have been expressed in writing, but which are not within the statute of frauds.<sup>11</sup>

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of the contents of a document is allowed to be given, but this is a part of the general law of evidence.

#### **SAME—EVIDENCE AS TO FACT OF AGREEMENT.**

**247.** A document having been proved, parol evidence is admissible to show that it is not in fact a valid agreement, because of

- (a) Incapacity of a party to contract.
- (b) Unreality of consent by reason of mistake, misrepresentation, fraud, duress, or undue influence.

<sup>8</sup> *Harris v. Bickett*, 4 Hurl. & N. 1.

<sup>9</sup> *Bergan v. Williams*, 138 Mass. 544; *Barney v. Forbes*, 118 N. Y. 580, 23 N. E. Rep. 890; *Blake v. Coleman*, 22 Wis. 396; *Beer v. Aultman & Taylor Co.*, 32 Minn. 90, 19 N. W. Rep. 388; *Myers v. Munson*, 65 Iowa, 423, 21 N. W. Rep. 759; *Colby v. Dearborn*, 59 N. H. 326.

<sup>10</sup> *Ante*, p. 123.

<sup>11</sup> *Edwards v. Insurance Soc.*, 1 Q. B. Div. 563; note 9, *supra*.

- (c) **Illegality of object.**
- (d) **Want of consideration in case of simple contracts, where the writing does not express the consideration. The rule also applies to contracts under seal in those jurisdictions where the seal does not dispense with the necessity for a consideration.**
- (e) **Want or inadequacy of consideration in case of contracts under seal, to corroborate evidence of alleged fraud or undue influence.**
- (f) **Parol condition suspending operation of written contract, whether under seal or not.**

Thus far we have dealt with the mode of bringing a document purporting to be an agreement, or part of an agreement, before the court. The document having been proved, and showing prima facie a binding contract, further questions as to the admissibility of parol evidence arise. Parol evidence is always admissible to show that the document is not in fact a valid agreement. It may be shown, for instance, that incapacity of one of the parties, want of genuine consent because of mistake, fraud, etc.,<sup>12</sup> or illegality of object,<sup>13</sup> made the agreement of the parties unreal, or such as the law forbids to be carried out. In case of a simple contract, or of a contract under seal in those jurisdictions where the seal does not dispense with the necessity for a consideration, it may be shown, where the promise only appears in writing, that no consid-

<sup>12</sup> *Grand Tower R. Co. v. Walton* (Ill. Sup.) 37 N. E. Rep. 920; *Ewing v. Wilson*, 132 Ind. 223, 31 N. E. Rep. 65; *Hick v. Thomas*, 90 Cal. 289, 27 Pac. Rep. 208, 376; *Cooper v. Flnke*, 38 Minn. 2, 35 N. W. Rep. 469; *Lewis v. Willoughby*, 43 Minn. 307, 45 N. W. Rep. 439; *Anderson v. Walter*, 34 Mich. 113; *Wanner v. Landis*, 137 Pa. St. 61, 20 Atl. Rep. 950; *Universal Fashion Co. v. Skinner*, 19 N. Y. Supp. 62; *Kranich v. Sherwood* (Mich.) 52 N. W. Rep. 741; *Peck v. Jenison* (Mich.) 58 N. W. Rep. 312; *Scrogin v. Wood* (Iowa) 54 N. W. Rep. 437; *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. Rep. 393; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. Rep. 241.

<sup>13</sup> *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Friend v. Miller*, 52 Kan. 139, 34 Pac. Rep. 397; *Buffendeau v. Brooks*, 28 Cal. 642; *Beadles v. McElrath*, 85 Ky. 230, 3 S. W. Rep. 152; *Totten v. United States*, 92 U. S. 105; *New England Mortgage Co. v. Gay*, 33 Fed. Rep. 636; *Benicia Agricultural Works v. Estes* (Cal.) 32 Pac. Rep. 938.

eration was given for the promise.<sup>14</sup> In case of a deed, at common law, want of consideration cannot ordinarily be shown, because its validity does not depend on consideration, but on its form; but, where fraud or undue influence is alleged against the validity of the deed, the absence or inadequacy of consideration may be shown in corroboration of other evidence tending to sustain the allegation.

Apart from such circumstances as these, it is permissible to prove a parol condition suspending the operation of the contract; and this applies both to deeds and simple contracts. A deed, for instance, may be shown to have been signed, or to have been delivered to a third person subject to the happening of an event or the doing of an act. In the latter case, until the event happens, or the act is done, the deed remains an escrow, and the terms upon which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument; but, as we have seen, this cannot be where the deed is delivered to the other party himself, or to his agent.<sup>15</sup>

<sup>14</sup> As to the conclusiveness of the recital of consideration in a written contract or conveyance, there has been a great deal of conflict in the decisions. The New York court, after an exhaustive review of the cases, has held in a leading case that the consideration clause in a conveyance is only prima facie evidence of a consideration, except for the purpose of giving effect to the operative words of the conveyance, and that to that end, and that alone, is it conclusive. The rule, it seems, applies to all written contracts; and, though there may be cases to the contrary, it is the prevailing doctrine in this country. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460; *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. Rep. 862; *Goodspeed v. Fuller*, 46 Me. 141; *Rhine v. Ellen*, 36 Cal. 362; *Miller v. Edgerton*, 38 Kan. 36, 15 Pac. Rep. 894; *Hall v. Knappenberger* (Mo. Sup.) 6 S. W. Rep. 381; *Nichols, Shepard & Co. v. Burch*, 128 Ind. 324, 27 N. E. Rep. 737; *Fechheimer v. Trounstone*, 15 Colo. 386, 24 Pac. Rep. 882; *Lanier v. Faust*, 81 Tex. 186, 16 S. W. Rep. 994; *Barbee v. Barbee*, 109 N. C. 299, 13 S. E. Rep. 215, 792; *Mobile Bank v. McDonnell*, 89 Ala. 434, 8 South. Rep. 137; *Macomb v. Wilkinson*, 83 Mich. 486, 47 N. W. Rep. 336; *Halpin v. Stone*, 78 Wis. 183, 47 N. W. Rep. 177; *Ewing v. Wilson*, 132 Ind. 223, 31 N. E. Rep. 64; *Louisville Ry. Co. v. Neafus* (Ky.) 18 S. W. Rep. 1030; *Hall v. Solomon*, 61 Conn. 476, 23 Atl. Rep. 876; *Buford v. Shannon*, (Ala.) 10 South. Rep. 263; *Silvers v. Potters*, 48 N. J. Eq. 539, 22 Atl. Rep. 534; *Hill v. Whidden*, 158 Mass. 267, 33 N. E. Rep. 526; *Bristol Bank v. Stiger* (Iowa) 53 N. W. Rep. 265.

<sup>15</sup> Ante, p. 78; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. Rep. 799; *Richards v. Day*, 18 N. Y. Supp. 733; *Haworth v. Norris*, 28 Fla. 763, 10 South. Rep.

So, also, with simple contracts in writing. Evidence may be given to the effect that a document purporting to be a contract is not so in fact. It may be dependent upon a condition not expressed in the document, so that, until the condition happens, the parties agree that the written contract is to remain inoperative. In a case involving this point, the law was stated as follows: "The point made is that this is a written agreement, absolute on the face of it, and that evidence was adduced to show it was conditional: and, if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never an agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and if, in fact, he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence. But in the present case the defense begins one step earlier. The parties met and expressly stated to each other that though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defense may be set up without ground, and I agree that a jury should therefore always look on such a defense with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."<sup>18</sup>

18; *Gregory v. Littlejohn*, 25 Neb. 368, 41 N. W. Rep. 253; note 17, *infra*. Proof that the parties who signed a bond did so on the condition that other persons named therein as sureties would also sign it is competent to show that it was never completely executed. *State v. Wallis*, 57 Ark. 64, 20 S. W. Rep. 811.

<sup>18</sup> *Pym v. Campbell*, 6 El. & Bl. 370. And see *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. Rep. 408; *Wilson v. Powers*, 131 Mass. 539; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. Rep. 174; *Juilliard v. Chaffee*, 92 N. Y. 529; *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. Rep. 127; *Lipscomb v. Lipscomb*, 32 S. C. 243, 10 S. E. Rep. 929; *Solenberger v. Gilbert*, 86 Va. 778, 11 S. E. Rep. 789; *Humphreys v. Railroad Co.*, 88 Va. 431, 13 S. E. Rep. 985; *Gibbons v. Ellis*, 83 Wis. 434, 53 N. W. Rep. 701. This rule, in the absence of fraud, does not

**SAME—EVIDENCE AS TO THE TERMS OF THE CONTRACT.**

**248.** Parol evidence as to the terms of a contract which appears to be complete in writing is inadmissible, except

- (a) To prove terms which are supplementary or collateral to so much of the agreement as is in writing.
- (b) To explain terms of the contract which need explanation, as, for instance,
  - (1) To identify parties.
  - (2) To identify subject-matter.
  - (3) To show the application of words or phrases.
- (c) To introduce a custom or usage into the contract.
- (d) In the application by courts of equity of their peculiar remedies in cases of mistake.

The admissibility of extrinsic evidence affecting the terms of a contract is narrowed to a small compass, for, as we have already said, it is the general rule that the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties.<sup>17</sup> The exceptions to this rule have

permit parol evidence of an agreement contemporaneous with a written contract, such as a note or bond, which has been completely executed and finally delivered, so as to take effect, that the obligee or promisee would not enforce the contract, or that the liability of the obligor or promisor should be dependent upon a condition not expressed in the writing. See the following note.

<sup>17</sup> *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. Rep. 805; *White v. Boyce*, 21 Fed. Rep. 228; *Low v. Studabaker*, 110 Ind. 57, 10 N. E. Rep. 301; *Pierce v. Tidwell*, 81 Ala. 290, 2 South. Rep. 15; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. Rep. 110; *Boffinger v. Tuyen*, 120 U. S. 198, 7 Sup. Ct. Rep. 529; *De Long v. Lee* (Iowa) 34 N. W. Rep. 613; *Gilbert v. Plow Co.*, 119 U. S. 491, 7 Sup. Ct. Rep. 305; *Williams v. Kent*, 67 Md. 350, 10 Atl. Rep. 228; *Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547, 5 Atl. Rep. 253; *Reddington v. Lanahan*, 59 Md. 429; *Exhaust Ventilation Co. v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 454, 34 N. W. Rep. 509; *Conant v. Bank*, 121 Ind. 323, 22 N. E. Rep. 250; *Merchants' & Farmers' Nat. Bank v. McElwee*, 104 N. O. 305, 10 S. E. Rep. 295; *Harrow Spring Co. v. Harrow Co.* (Mich.) 51 N. W. Rep. 107; *Gasper v. Helmbach* (Minn.) 55 N. W. Rep. 559. Where, for instance, an instrument in the form of a promissory note has been given, it



been shortly stated in the black-letter text, but it will be well for us to consider them more fully.

*Proof of Supplementary or Collateral Terms.*

If the parties to a contract have not put all its terms in writing, parol evidence of the supplementary terms is admissible, not to

cannot be shown by parol that it was not intended as a note, but merely as a memorandum imposing no liability. *Burnes v. Scott*, *supra*. "The legal effect of a written contract is as much within the protection of the rule which forbids the introduction of parol evidence as its language." *Barry v. Ransom*, 12 N. Y. 464. In the absence of fraud, parol evidence is not admissible to show that the obligee, contemporaneously with the execution of a bond, promised not to enforce it as against one of the parties who executed it. *Towner v. Lucas*, 13 Grat. (Va.) 705; *Barnett v. Barnett*, 83 Va. 504, 2 S. E. Rep. 733; *Yeager v. Yeager* (Pa. Sup.) 8 Atl. Rep. 579. Nor, where a written contract not under seal has been fully executed and delivered, and nothing remains to be done to complete it, is parol evidence admissible of an understanding that it should not be operative according to its terms, or that the liability of the promisor, absolute on the face of the instrument, was intended to be conditional. *McCormick Harvesting Mach. Co. v. Wilson*, 39 Minn. 467, 40 N. W. Rep. 571; *Marquls v. Lauretson*, 76 Iowa, 23, 40 N. W. Rep. 73; *Meekins v. Newberry*, 101 N. C. 17, 7 S. E. Rep. 655; *Thompson v. McKee*, 5 Dak. 172, 37 N. W. Rep. 367; *Coapstick v. Bosworth*, 121 Ind. 6, 22 N. E. Rep. 772; *Dexter v. Oblander*, 93 Ala. 441, 9 South. Rep. 361; *Garner v. Fite*, 93 Ala. 405, 9 South. Rep. 367; *Englehorn v. Rettlinger*, 122 N. Y. 76, 25 N. E. Rep. 297; *Ziegler v. McFarland*, 147 Pa. St. 607, 23 Atl. Rep. 1045; In an action on a note, for instance, promising to pay a certain sum of money annually during the payee's life, evidence that it was orally agreed that the money need not be paid, if not needed for the payee's support, is not admissible. *Osborne v. Taylor*, 58 Conn. 439, 20 Atl. Rep. 605. As to parol condition suspending the operation of the contract, see notes 15, 16, *supra*. Parol evidence is not admissible to show that an absolute promise in a note to pay money is to be performed only on a contingency. *Curtice v. Hokanson*, 38 Minn. 510, 38 N. W. Rep. 694; *Harrison v. Morrison*, 30 Minn. 319, 40 N. W. Rep. 66. The rule that parol evidence is not admissible to contradict or vary a written contract is confined to the parties to the contract, or their privies; and it does not even apply as between one of the parties to it and a stranger. *Clapp v. Banking Co.*, 50 Ohio St. 528, 35 N. E. Rep. 308; *Highstone v. Burdette*, 61 Mich. 54, 27 N. W. Rep. 852; *Bruce v. Lumber Co.*, 87 Va. 381, 13 S. E. Rep. 153; *Fonda v. Burton*, 63 Vt. 355, 22 Atl. Rep. 594; *National Car & Locomotive Builder v. Cyclone Snow Plow Co.*, 49 Minn. 125, 51 N. W. Rep. 657; *Grove v. Rentch*, 26 Md. 367; *Clerihew v. Bank* (Minn.) 52 N. W. Rep. 967; *Arbuckle v. Smith*, 74 Mich. 568, 42 N. W. Rep. 124; *First Nat. Bank v. Dunn* (N. J.) 27 Atl. Rep. 908; *Horn v. Hansen* (Minn.) 57 N. W. Rep. 315; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. Rep. 386.

vary, but to complete, the written contract.<sup>18</sup> Under this rule, a subsequent agreement changing the terms of a written contract may be shown by parol evidence. It does not contradict, but supplements, the writing.<sup>19</sup> So, also, where a written contract for the sale of goods mentions the price, but is silent as to the terms of payment, the terms may be shown by parol evidence.<sup>20</sup> The rule, of course, is not limited to these cases. In an English case the plaintiff had agreed to assign to the defendant a contract for the purchase of lands from a third person. The assignment was to be made on certain terms, and a memorandum of the agreement was made in writing, from which, at defendant's request, some of the terms were omitted, the memorandum being in fact only made in order to obtain a conveyance of the land from the third person. When this was done, and the defendant was put in possession, he refused to fulfill the omitted terms, and, when sued, contended that the written memorandum could not be added to by parol evidence. It was held, however, that the memorandum was "a mere piece of machinery obtained by the demurring defendant from the plaintiffs, as subsidiary to, and for the purposes of, the verbal and only real agreement, under circumstances which

<sup>18</sup> *Potter v. Hopkins*, 25 Wend. (N. Y.) 417; *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Grierson v. Mason*, 60 N. Y. 394; *Smith v. Wood* (Ind. Sup.) 32 N. E. Rep. 921; *Holt v. Ple*, 120 Pa. St. 425, 14 Atl. Rep. 389; *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. Rep. 311; *Raynor v. Drew*, 72 Cal. 307, 13 Pac. Rep. 866; *Reynolds v. Hassam*, 56 Vt. 449; *Coates v. Sangston*, 5 Md. 121; *Walter A. Wood Mach. Co. v. Gaertner*, 55 Mich. 433, 21 N. W. Rep. 885; *Lash v. Parlin*, 78 Mo. 391; *Louisville & C. R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. Rep. 711; *Bretto v. Levine* (Minn.) 52 N. W. Rep. 525; *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566; *Peabody v. Bement*, 79 Mich. 47, 44 N. W. Rep. 416; *Bank v. Cooper*, 137 U. S. 473, 11 Sup. Ct. Rep. 160.

<sup>19</sup> *Smith v. Lilley*, 11 R. I. 119, 20 Atl. Rep. 227; *Coates v. Sangston*, 5 Md. 121; *Stallings v. Gottschalk* (Md.) 26 Atl. Rep. 524; *Snow v. Alley*, 151 Mass. 14, 23 N. E. Rep. 576; *Holloway v. Frick*, 149 Pa. St. 178, 24 Atl. Rep. 201; *Grace v. Lynch*, 80 Wis. 166, 49 N. W. Rep. 751; *Bannon v. Aultman*, 80 Wis. 307, 49 N. W. Rep. 967; *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. Rep. 673. The evidence may be admitted to show not only a subsequent express agreement, but also to show acts constituting an alteration. *Holloway v. Frick*, *supra*.

<sup>20</sup> *Paul v. Owings*, 32 Md. 402; *Magill v. Stoddard*, 70 Wis. 75, 35 N. W. Rep. 346; note 22, *infra*.

would make the use of it for any purpose inconsistent with that agreement dishonest and fraudulent.”<sup>21</sup>

Again, evidence may be given of a verbal agreement collateral to the written contract, subjecting it to a term unexpressed in its contents; but such a term cannot be enforced if it is contrary to the tenor of the writing.<sup>22</sup> “No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a ‘collateral agreement,’ where the parties have entered into an agreement for a lease, or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved.”<sup>23</sup>

<sup>21</sup> *Jervis v. Berridge*, 8 Ch. App. 351.

<sup>22</sup> *Lindley v. Lacy*, 17 C. B. (N. S.) 578; *Ayer v. Manufacturing Co.*, 147 Mass. 46, 16 N. E. Rep. 754; *Chapin v. Dobson*, 78 N. Y. 74; *McCormick v. Cheevers*, 124 Mass. 262; *Carr v. Dooley*, 119 Mass. 294; *Crosman v. Fuller*, 17 Pick. (Mass.) 171; *Hersey v. Verrill*, 30 Me. 271; *Bonney v. Morrill*, 57 Me. 368; *Walker v. France*, 112 Pa. St. 203, 5 Atl. Rep. 208; *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. Rep. 918; *Palmer v. Roath*, 86 Mich. 602, 49 N. W. Rep. 590; *Durkin v. Cobleigh* (Mass.) 30 N. E. Rep. 474; *Phoenix Pub. Co. v. Clothing Co.* (Minn.) 55 N. W. Rep. 912; *Keen v. Beckman*, 66 Iowa, 672, 24 N. W. Rep. 270. Parol evidence is admissible to show that persons signed a note as sureties only, or that they signed as principals, and not as sureties. “The fact is collateral to the contract, proving simply the relation of the parties.” *Hubbard v. Gurney*, 64 N. Y. 457. And see *Otis v. Van Storch*, 15 R. I. 41, 23 Atl. Rep. 39; *Bradley Fertilizer Co. v. Caswell* (Vt.) 26 Atl. Rep. 956; *Vestal v. Knight*, 54 Ark. 97, 15 S. W. Rep. 17; *Bulkeley v. House*, 62 Conn. 459, 26 Atl. Rep. 352; *Trustees v. Southard*, 31 Ill. App. 359. It is otherwise, however, in the case of bonds. “In the case of a bond, the fact as to what relation the signers bear thereto is not collateral to the contract, but is clearly and unequivocally expressed upon its face and in the body of the instrument. To change that relation by oral evidence changes the terms and legal effect of the instrument itself.” *Coots v. Farnsworth*, 61 Mich. 497, 28 N. W. Rep. 534. Where a note or other written contract specifies no time for payment, parol evidence of a contemporaneous agreement as to the time of payment is admissible. *Horner v. Horner*, 145 Pa. St. 258, 23 Atl. Rep. 441; *Sivers v. Sivers* (Cal.) 82 Pac. Rep. 571; note 20, *supra*.

<sup>23</sup> *Erskine v. Adeane*, 8 Ch. App. 756.

*Explanation of Terms.*

Parol evidence is also admissible, where it is necessary in order to explain the terms of a written contract. Explanation of terms may merely amount to evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent has contracted in his own name, but on behalf of a principal whose name or whose existence he failed to disclose.<sup>24</sup> Or, again, it may be a description of the subject-matter of a contract that needs explanation. Where, for instance, persons agreed to buy from another certain wool, which was described as "your wool," and the right of the seller to introduce evidence of the quality and quantity of the wool was disputed, the evidence was held admissible. "I am of opinion," it was said, "that the plaintiffs are entitled to succeed. I assume that they must prove a written contract, and that that contract must contain all the material terms. The contract here is most explicit. It is to purchase of the plaintiffs 'your wool,' at 16s. a stone, to be delivered at Liverpool. The oral

<sup>24</sup> *Wake v. Harrop*, 6 Hurl. & N. 768; *Darrow v. Produce Co.*, 57 Fed. Rep. 463; *Mobberly v. Mobberly*, 60 Md. 376; *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. Rep. 59; *Cleveland v. Burnham*, 64 Wis. 347, 25 N. W. Rep. 407; *Sauer v. Brinker*, 77 Mo. 289; *Simpson v. Dix*, 131 Mass. 179; *Martin v. Smith*, 63 Miss. 1, 3 South. Rep. 33; *Johnson v. Pennell*, 67 Iowa, 669, 25 N. W. Rep. 874; *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. Rep. 788; *Louisville, etc., Ry. Co. v. Power*, 119 Ind. 269, 21 N. E. Rep. 751; *Barkley v. Tarrant*, 20 S. C. 574; *Rumbough v. Southern Imp. Co.*, 106 N. C. 461, 11 S. E. Rep. 628; *Northern Nat. Bank v. Lewis*, 78 Wis. 475, 47 N. W. Rep. 834; *Bartlett v. Remington*, 59 N. H. 364. Where, for instance, a writing describes one of the parties as the "First National Bank," parol evidence is admissible to show that the "First National Bank of C." was meant. *First Nat. Bank v. North* (S. D.) 51 N. W. Rep. 96. The writing, however, cannot be contradicted as to the parties. Parol evidence, for instance, is not admissible to show that an order reading "Ship to me," and signed "G. G. Bauder," was intended to be the order of the firm of "George G. Bauder & Co." *Osgood v. Bauder*, 82 Iowa, 171, 47 N. W. Rep. 1001. A person who has contracted in his own name cannot, to escape liability himself, show that he intended to bind another. *Dexter v. Ohlander*, 93 Ala. 441, 9 South. Rep. 361; *Williams v. Printing Co.*, 43 Minn. 537, 45 N. W. Rep. 1133; *Cream City Glass Co. v. Friedlander* (Wis.) 54 N. W. Rep. 28. Contra, where the maker of a note affixes to his signature the letters "Agt." *Kelden v. Winegar* (Mich.) 54 N. W. Rep. 901. As to the admissibility of evidence to show the relation of signers of an instrument in respect of whether they are principals or sureties, see note 22, *supra*.

evidence is undoubtedly admissible to identify the subject-matter of the contract, and to show what 'your wool' really was. The judge, who has to construe the written document, cannot have judicial knowledge of the subject-matter, and evidence has been invariably allowed to identify it."<sup>25</sup>

Again, it may be necessary to explain some word or clause in the writing, not describing the subject-matter of the contract, but describing the amount and character of the responsibility which one of the parties takes upon himself as to the conditions of the contract. Where, for instance, a person accepted an order upon him by one who had contracted to do certain work for him, "to be paid out of the last installment," evidence was admitted to show that the meaning of the words quoted was that the order was only to be paid out of the last payment to a certain person provided for in the contract, and that, if that person did not fulfill his contract so that the last payment would become due and payable, there should be no liability on the order.<sup>26</sup> So, also, where a

<sup>25</sup> *Macdonald v. Longbottom*, 1 El. & El. 977; *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. Rep. 282; *Bulkley v. Devine*, 127 Ill. 406, 20 N. E. Rep. 16; *Clark v. Coffin Co.*, 125 Ind. 277, 25 N. E. Rep. 288; *Thompson v. Stewart*, 60 Iowa, 223, 14 N. W. Rep. 247; *Adams v. Morgan*, 150 Mass. 143, 22 N. E. Rep. 708; *Thornell v. City of Brockton*, 141 Mass. 151, 6 N. E. Rep. 74; *Barrett v. Murphy*, 140 Mass. 133, 2 N. E. Rep. 833; *Warner v. Miltenberger*, 21 Md. 265; *Stockham v. Stockham*, 32 Md. 196; *Busby v. Bush*, 79 Tex. 656, 15 S. W. Rep. 638; *Thacker v. Howell* (Ky.) 26 S. W. Rep. 719; *Rapley v. Klugh* (S. C.) 18 S. E. Rep. 680; *Merriam v. United States*, 107 U. S. 437, 2 Sup. Ct. Rep. 536; *Reed v. Insurance Co.*, 95 U. S. 23.

<sup>26</sup> *Proctor v. Hartigan*, 143 Mass. 462, 9 N. E. Rep. 841. So, where a contract provided that chemicals should be furnished at the "ruling market rates," and it appeared that the market rates of importers were a trifle below those of jobbers, evidence was admitted to show which of the market rates the parties meant. *Manchester Paper Co. v. Moore*, 104 N. Y. 680, 10 N. E. Rep. 861. And see *Ferguson v. Davis*, 65 Mich. 677, 32 N. W. Rep. 892; *Wickes Bros. v. Electric Light Co.*, 70 Mich. 322, 38 N. W. Rep. 299; *Rhodes v. Wilson*, 12 Colo. 65, 20 Pac. Rep. 746; *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. Rep. 918; *Clay v. Field*, 138 U. S. 404, 11 Sup. Ct. Rep. 419; *Macdonald v. Dana*, 154 Mass. 152, 27 N. E. Rep. 993; *City of Elgin v. Joslyn*, 36 Ill. App. 301; *Id.* (Ill. Sup.) 26 N. E. Rep. 1090; *Fawkner v. Wall-Paper Co.* (Iowa) 49 N. W. Rep. 1003; *Hurd v. Bovee*, 7 N. Y. Supp. 241; *Id.*, 134 N. Y. 595, 31 N. E. Rep. 624; *Durr v. Chase* (Mass.) 36 N. E. Rep. 741; *Halladay v. Hess*, 147 Ill. 538, 35 N. E. Rep. 380.

vessel is warranted "seaworthy," a house promised to be kept "in tenantable repair," or a thing undertaken to be done in a "reasonable manner," parol evidence is admissible to show the application of these phrases to the subject-matter of the contract, so as to ascertain the intention of the parties. In every policy of marine insurance there is an implied warranty by the assured that the vessel is "seaworthy." In an action on such a policy, in which evidence was held admissible to show that the word "seaworthy" was understood in a modified sense with reference to the particular vessel and voyage, the rule above stated was thus explained: "It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject-matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, sed *secundum quid*, the extent and the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to inquire whether the house be an old one in St. Giles', or a new palace in Grosvenor square for the purpose of ascertaining whether the tenant has complied with his covenant, for that which would be repair in a house of the one class is not so when applied to a house of the other."<sup>27</sup> So, suppose a sale of a horse warranted to go well in harness; the qualities necessary to constitute a good goer in harness would be different in a pony fit to draw a lady's carriage or a dray horse; or in a lease of Whiteacre for a year with an express contract to cultivate it in a proper manner, the quantity of labor and manure which the tenant would have to bestow must be different according as Whiteacre consists of hop gardens or meadows. In each of these cases you legitimately inquire what is the subject-matter of the contract, and then the terms of the stipulation are to be understood, not *simpliciter*, but *secundum quid*. The two last instances I have supposed are not, as far as I know, decided cases; but I give them to explain my meaning as examples of a general rule. Now, according to the view already expressed, seaworthiness is a term

<sup>27</sup> *Payne v. Haine*, 10 Mees. & W. 541.

relative to the nature of the adventure; it is to be understood, not simpliciter, but secundum quid."<sup>28</sup>

Cases of the sort we have just described are called cases of latent ambiguity, as distinguished from patent ambiguities, where words are omitted or contradict one another. In the latter cases explanatory evidence is not admissible. Thus, where a bill of exchange was drawn for one sum in words, and the figures at the top were for a larger amount, evidence was not admitted to show that the bill was intended to be drawn for the latter amount.<sup>29</sup>

*Evidence of Custom and Usage.*

Evidence of the custom or usage of a trade, or of a particular locality, is admissible, though it may add a term to a contract, or may attach a special, and sometimes unnatural, meaning to one of the terms expressed.<sup>30</sup>

*Same—To Add a Term to the Contract.*

As an instance of a usage which annexes a term to a contract, we may cite the warranty of seaworthiness which by custom is always implied in a contract of marine insurance, though not specially mentioned. So, also, in a case of agricultural customs, a usage that the tenant, quitting his farm at Christmas, was entitled to reap grain sown the preceding autumn, was held in England to be annexed to his lease, though the lease was under seal, and was silent on the subject.<sup>31</sup> And in a New York case it was held that, where a contract for excavating city lots was silent as to whom the sand and dirt taken out should belong to, a well-known custom by which it belonged to the excavator, and not to

<sup>28</sup> *Burges v. Wickham*, 3 Best & S. 609.

<sup>29</sup> *Sanderson v. Piper*, 5 Bing. N. C. 425.

<sup>30</sup> *Wilcox v. Wood*, 9 Wend. (N. Y.) 346; *Rindskoff v. Barrett*, 14 Iowa. 101; *Potter v. Morland*, 8 Cush. (Mass.) 384; *Sampson v. Gazzan*, 6 Port. (Ala.) 123; *Appleman v. Fisher*, 34 Md. 540; *Thompson v. Brannin* (Ky.) 21 S. W. Rep. 1057; *Swift Iron Works v. Drury*, 37 Ohio St. 242; *Steamboat Albatross v. Wayne*, 16 Ohio, 513; *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. Rep. 105; *Patterson v. Crowther*, 70 Md. 124, 16 Atl. Rep. 531; *Brown Chemical Co. v. Atkinson*, 91 N. C. 389; *McCullough v. Hellwig*, 66 Md. 269, 7 Atl. Rep. 455; *Kraft v. Faucher*, 44 Md. 216; *Breen v. Moran* (Minn.) 53 N. W. Rep. 755.

<sup>31</sup> *Wigglesworth v. Dollison*, 1 Smith, Lead. Cas. 594.

the owner of the lots, might be shown as evidence of the contract.<sup>33</sup>

The principle on which usages are so annexed has been said to rest on the "presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."<sup>34</sup>

*Same—To Explain Terms.*

Proof of custom and usage is also admissible to explain words and phrases in contracts, where they are commercial terms, or otherwise subject to known customs. The principle on which such explanation is admitted has been said to be "that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. \* \* \* In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language."<sup>35</sup> As illustrating this rule, in commercial contracts in the case of charter parties in which the days allowed for unloading the ship are to commence "on arrival" at the port of discharge, evidence may be given to show what is commonly understood to be the port; for some ports are of large area, and, by custom, "arrival" is understood to mean arriving at a particular spot in the port.<sup>36</sup> Another illustration is a case in which a covenant by the lessee of a rabbit warren that he would leave 10,000 rabbits on the warren was explained by evidence of a usage of the locality to mean 12,000, because

<sup>33</sup> *Cooper v. Kane*, 19 Wend. (N. Y.) 386. And see *Hewitt v. Lumber Co.*, 77 Wis. 548, 46 N. W. Rep. 822.

<sup>34</sup> *Hutton v. Warren*, 1 Mees. & W. 466; *Appleman v. Fisher*, 34 Md. 540.

<sup>35</sup> *Brown v. Byrne*, 3 El. & Bl. 703, at page 716. And see *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, 25 N. E. Rep. 901; *Scott v. Hartley*, 126 Ind. 239, 25 N. E. Rep. 826; *Atkinson v. Truesdell*, 6 N. Y. Supp. 509, 127 N. Y. 230, 27 N. E. Rep. 844; *Dana v. Fielder*, 12 N. Y. 40; *Smith v. Wright*, 1 Gaines (N. Y.) 43; *Coit v. Insurance Co.*, 7 Johns. (N. Y.) 385; *Drury v. Young*, 58 Md. 546; *Myers v. Tibbals*, 72 Cal. 278, 13 Pac. Rep. 695; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. Rep. 802; *Myers v. Walker*, 24 Ill. 133; *Lonergan v. Stewart*, 55 Ill. 44; *Packard v. Van Schoick*, 58 Ill. 79; *Long v. Davidson*, 101 N. C. 170, 7 S. E. Rep. 758; *Evans v. Manufacturing Co.*, 118 Mo. 548, 24 S. W. Rep. 175; *Callahan v. Stanley*, 57 Cal. 476; *Ellmaker v. Ellmaker*, 4 Watts (Pa.) 89.

<sup>36</sup> *Nordon Steam Co. v. Dempsey*, 1 C. P. Div. 654.



1,000 meant 1,200.<sup>36</sup> There have been similar decisions in this country, but this case has been criticised.

Closely connected with this principle is the admissibility of expert testimony to explain terms of art or technical phrases when used in documents.<sup>37</sup>

*Same—Requisites of Custom or Usage.*

In order that a custom or usage may affect a contract, either by adding or explaining terms, it must meet certain requirements.

In the first place, the usage must have been established at the time the contract was made. It need not have existed for any particular length of time, but it must have been recognized as an existing rule, not only up to and at the date of the contract, but for a sufficient time before the contract to have become generally known.<sup>38</sup> This rule that the usage must have been established includes several other rules which have sometimes been stated separately, namely, that it must have been uniform and certain,<sup>39</sup> con-

<sup>36</sup> *Smith v. Wilson*, 3 Barn. & Adol. 723; *Soutier v. Kellerman*, 18 Mo. 509. In an action for mason work at a specified price per perch, where the dispute is as to the number of perches contained in the work, a uniform, universal, and notorious custom of measurement among masons is binding, though the result of such measurement is greater than the actual contents. *McCullough v. Ashbridge*, 155 Pa. St. 166, 28 Atl. Rep. 10; *Hinton v. Locke*, 5 Hill (N. Y.) 437. But see *Sweeney v. Thomason*, 9 Lea (Tenn.) 359; *Wilkinson v. Williamson*, 76 Ala. 103; *Barlow v. Lambert*, 28 Ala. 704; post, p. 536.

<sup>37</sup> *Hill v. Evans*, 31 L. J. Ch. 457; *Dana v. Fielder*, 12 N. Y. 40; *Fruin v. Railway Co.*, 89 Mo. 397, 14 S. W. Rep. 557; *Gauch v. Insurance Co.*, 88 Ill. 251; *Reed v. Hobbs*, 2 Scam. (Ill.) 297; *Jones v. Anderson*, 82 Ala. 302, 2 South. Rep. 911; *Welsh v. Huckestein*, 152 Pa. St. 27, 25 Atl. Rep. 138.

<sup>38</sup> *Adams v. Otterback*, 15 How. 539; *Wilson v. Bauman*, 80 Ill. 493; *Packard v. Van Scholck*, 58 Ill. 79; *Ulmer v. Farnsworth*, 80 Me. 500, 15 Atl. Rep. 65; *Hall v. Storrs*, 7 Wis. 253; *Ambler v. Phillips*, 132 Pa. St. 167, 19 Atl. Rep. 71; *Corcoran v. Chess*, 131 Pa. St. 356, 18 Atl. Rep. 876; *Thompson v. Hamilton*, 12 Pick. (Mass.) 425; *Smith v. Wright*, 1 Calnes (N. Y.) 43; *Leach v. Perkins*, 17 Me. 402; *Cooper v. Berry*, 21 Ga. 526; *Buford v. Tucker*, 44 Ala. 89; *Alabama & T. R. Co. v. Kidd*, 35 Ala. 209.

<sup>39</sup> *Foley v. Mason*, 6 Md. 37; *Murray v. Spencer*, 24 Md. 520; *Hibbard v. Peek*, 75 Wis. 619, 44 N. W. Rep. 641; *Vos v. Robinson*, 9 Johns. (N. Y.) 192; *Oelricks v. Ford*, 23 How. 49; *Minis v. Nelson*, 43 Fed. Rep. 777; *Illinois Masons' Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Smith v. Hess*, 83 Iowa, 238, 48 N. W. Rep. 1030; *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417; *The*

tinued,<sup>40</sup> and peaceable and acquiesced in.<sup>41</sup> If it does not meet these requirements, it certainly cannot be regarded as established.

Another rule which is included in this is that a usage must be general. If it is not so, it cannot be regarded as an established usage, and is not obligatory on the parties unless it is expressly shown that they knew of it, and contracted with reference to it.<sup>42</sup> A particular bank, for instance, could not alone, by adopting a rule governing its own business, thereby establish a usage which would be obligatory on all persons dealing with it; nor could a usage be so established by a single tradesman, a single railroad company, or any other one person or corporation.<sup>43</sup> It might be established, however, by all the banks in a certain city, or all the tradesmen in a particular line of business. Though confined to a single city, it would be sufficiently general to be obligatory on all persons in that city.<sup>44</sup> Even here, however, it would scarcely be binding on persons living at a distance, unless it were shown affirmatively that they knew of it.<sup>45</sup>

It is a general rule that the usage must have been known to the parties;<sup>46</sup> but, if a usage is established and is general, it is pre-

Harbinger, 50 Fed. Rep. 941; *Strong v. Railroad Co.*, 15 Mich. 205; *Desha v. Holland*, 12 Ala. 513; *Hinton v. Coleman*, 45 Wis. 165; *Wallace v. Morgan*, 23 Ind. 390.

<sup>40</sup> *Johnson v. Stoddard*, 100 Mass. 308; *Michigann Cent. R. Co. v. Coleman*, 28 Mich. 440; *Brent v. Cook*, 12 B. Mon. (Ky.) 267; *Walker v. Barron*, 6 Minn. 508 (Gil. 353).

<sup>41</sup> *Dixon v. Dunham*, 14 Ill. 324; *Strong v. Railroad Co.*, 15 Mich. 205; *McMasters v. Railroad Co.*, 69 Pa. St. 374.

<sup>42</sup> ~~*Patterson v. Crowther*, 70 Md. 124~~, 16 Atl. Rep. 531; *Duling v. Railroad Co.*, 66 Md. 120, 6 Atl. Rep. 592; *Citizens' Bank v. Grafflin*, 31 Md. 507; *Miller v. Moore*, 83 Ga. 684, 10 S. E. Rep. 300; *Lamb v. Henderson*, 63 Mich. 302, 29 N. W. Rep. 732.

<sup>43</sup> *Adams v. Otterback*, 15 How. 539.

<sup>44</sup> *Renner v. Bank*, 9 Wheat. 587; *Mills v. Bank*, 11 Wheat. 431.

<sup>45</sup> *German American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 South. Rep. 117; *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. Rep. 731; *Simon v. Johnson* (Ala.) 13 South. Rep. 491.

<sup>46</sup> *Bliven v. Screw Co.*, 23 How. 420; *Dawson v. Kittle*, 4 Hill (N. Y.) 107; *Martin v. Hall*, 26 Mo. 386; *Walsh v. Transportation Co.*, 52 Mo. 434; *Martin v. Maynard*, 16 N. H. 105; *Murray v. Brooks*, 41 Iowa, 45; *Sugart v. Mays*, 54 Ga. 554; *Caldwell v. Dawson*, 4 Metc. (Ky.) 121; *Janney v. Boyd*, 30 Minn. 319, 15 N. W. Rep. 308; *Scott v. Whitney*, 41 Wis. 504; *Power*

sumed to have been known to them, and is obligatory without affirmative proof of knowledge, and even in case of ignorance.<sup>47</sup> If it is not a general usage, or if, for want of uniformity, or any other reason, it cannot be held to have been "established" in the sense in which we have used that term, then it must be affirmatively shown that the parties had knowledge of the usage at the time of contracting, and contracted with reference to it.<sup>48</sup> In order that a usage may be binding, it must have been actually or presumptively known to both of the parties, and not merely to the party who is sought to be charged by it. If the other party did not know of it, he could not have contracted with reference to it, and, unless both parties contracted with reference to it, it cannot be read into the contract. Want of knowledge of the usage on the part of one of them shows that it could not have entered into the contract.<sup>49</sup> As we have said, however, a general usage is presumed to be known.

It is also essential that a usage shall be consistent with rules of law, for "a universal usage cannot be set up against the general law."<sup>50</sup> If it is inconsistent with any rule of the common law,<sup>51</sup>

*v. Kane*, 5 Wis. 265; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Dodge v. Favor*, 15 Gray (Mass.) 82; *Sawtelle v. Drew*, 122 Mass. 228; *Randall v. Smith*, 63 Me. 105; *Marshall v. Perry*, 67 Me. 78; *Searson v. Heyward*, 1 Speer (S. C.) 249.

<sup>47</sup> *Walls v. Bailey*, 49 N. Y. 404; *Bailey v. Bensley*, 87 Ill. 556; *Lonergan v. Stewart*, 55 Ill. 44; *Blake v. Stump*, 73 Md. 160, 20 Atl. Rep. 988; *Given v. Charron*, 15 Md. 502; *Carter v. Coal Co.*, 77 Pa. St. 286; *Ford v. Tirrell*, 9 Gray (Mass.) 401; *Howard v. Walker* (Tenn.) 21 S. W. Rep. 897; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. Rep. 50; *Rindskoff v. Barrett*, 14 Iowa, 101; *Beatty v. Gregory*, 17 Iowa, 109; *Barton v. McKelway*, 22 N. J. Law, 165.

<sup>48</sup> *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. Rep. 731; *Sleght v. Hartshorne*, 2 Johns. (N. Y.) 532; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. Rep. 460; *Pennell v. Transportation Co.*, 94 Mich. 247, 53 N. W. Rep. 1049; *Corrigan v. Herrin*, 44 Ill. App. 363; *Martin v. Mill Co.*, 49 Mo. App. 23; *Brunnell v. Sawmill Co.*, 86 Wis. 587, 57 N. W. Rep. 364.

<sup>49</sup> *Nonotuck Silk Co. v. Fair*, 112 Mass. 354; *Chateaugay Ore & Iron Co. v. Blake*, *supra*.

<sup>50</sup> *Meyer v. Dremer*, 11 C. B. (N. S.) 646.

<sup>51</sup> *First Nat. Bank v. Tallafarro*, 72 Md. 164, 19 Atl. Rep. 364; *Susquehanna F. Co. v. White*, 66 Md. 444, 7 Atl. Rep. 802; *Gallatin v. Bradford*, 1 Bibb (Ky.) 209; *Dickinson v. Gay*, 7 Allen (Mass.) 29; *Cox v. O'Riley*, 4 Ind. 368;

or with any statute,<sup>53</sup> or is contrary to public policy,<sup>53</sup> it cannot be recognized. A usage, however, is not contrary to rules of law in this sense, merely because it makes the law applicable to the particular contract different from what it would be if the usage were not imported into the contract. This is generally the object and the natural effect of proving a usage.

A usage cannot be set up to affect a contract if it is unreasonable or oppressive.<sup>54</sup> A usage of agents, for instance, in collecting drafts for absent parties, to surrender them to the drawees at maturity, and, upon mere confidence in the good credit of the

*Hedden v. Roberts*, 134 Mass. 38; *Tucker v. Smith*, 68 Tex. 473, 3 S. W. Rep. 671; *Inglebright v. Hammond*, 19 Ohio, 337; *Globe Milling Co. v. Elevator Co.*, 44 Minn. 153, 46 N. W. Rep. 306; *Bodfish v. Fox*, 23 Me. 90; *Marshall v. Perry*, 67 Me. 78; *Winder v. Blake*, 4 Jones (N. C.) 332. But see *Frazier v. Warfield*, 13 Md. 279.

<sup>53</sup> *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. Rep. 114; *Ostego Bank v. Warren*, 18 Barb. (N. Y.) 200; *Mauzy v. Iron Co.*, 9 Paige (N. Y.) 188; *Cayser v. Taylor*, 10 Gray (Mass.) 274; *Trull v. Wheeler*, 19 Pick. (Mass.) 240; *Perkins v. Bank*, 21 Pick. (Mass.) 483; *Cutler v. Howe*, 122 Mass. 541; *Coleman v. McMurdo*, 5 Rand. (Va.) 51; *Delaplaine v. Haxall*, 15 Grat. (Va.) 457; *Palmer v. Transportation Co.*, 76 Hun, 181, 27 N. Y. Supp. 561; *Mansfield v. Inhabitants*, 15 Gray (Mass.) 149; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. Rep. 354; *Melrery v. McFarland*, 93 Ind. 466. Proof of usage, for instance, cannot give a different meaning to terms than that given by statute. *Green v. Moffett*, 22 Mo. 529; *Rodgers v. Allen*, 47 N. H. 529. Nor can proof of usage change the statutory duties of an officer. *Scribner v. Town of Hollis*, 48 N. H. 30; *Delaplaine v. Crenshaw*, 15 Grat. (Va.) 457; *Frazier v. Warfield*, 13 Md. 279. Nor can a violation of the usury laws be justified by proof of usage. *Gore v. Lewis*, 109 N. C. 530, 13 S. E. Rep. 909; *Dunham v. Gould*, 16 Johns. (N. Y.) 367; *Dunham v. Dey*, 13 Johns. (N. Y.) 40; *Greene v. Tyler*, 39 Pa. St. 361.

<sup>54</sup> *Raisin v. Clark*, 41 Md. 153.

<sup>55</sup> *Seccomb v. Insurance Co.*, 10 Allen (Mass.) 305; *Blackburn v. Mason*, 4 Reports, 297, 68 Law T. 510; *Minis v. Nelson*, 43 Fed. Rep. 777; *Central R. Co. v. Anderson*, 58 Ga. 393; *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302; *Whitney v. Esson*, 90 Mass. 308; *Boardman v. Spooner*, 13 Allen (Mass.) 353; *Strong v. Railroad Co.*, 15 Mich. 205; *Anderson v. Whitaker* (Ala.) 11 South. Rep. 919; *Nolte v. Hill*, 36 Ohio St. 186; *Oelrichs v. Ford*, 21 Md. 489; *Rosenstock v. Tormey*, 32 Md. 169; *Beals v. Terry*, 2 Sandf. (N. Y.) 127; *Haskins v. Warren*, 115 Mass. 514; *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517; *Gallatin v. Bradford*, 1 Bibb (Ky.) 209; *Christian v. Railroad Co.*, 20 Minn. 21 (Gil. 12); *Merchants Ins. Co. v. Prince* (Minn.) 52 N. W. Rep. 131; *Jordan v. Meredith*, 3 Yeates (Pa.) 318.

drawees, to take in exchange their checks upon banks, was held ineffectual because unreasonable. "It is not a reasonable usage," it was said, "that one who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check which may turn out to be worthless."<sup>55</sup>

Finally, the usage must not be inconsistent with the terms of the contract, for it is optional with the parties to exclude the usage if they think fit, and to frame their contract so as to be repugnant to its operation.<sup>56</sup> That the parties intended to contract with reference to a usage is only a presumption, and this presumption is overthrown if the terms which they have expressly introduced into their contract are inconsistent with the usage. "It may be that the very object of the express contract was to avoid the effect of

<sup>55</sup> *Whitney v. Esson*, *supra*. "One of the cardinal rules by which the recognition and application of usages in courts of law is governed is that they must be reasonable; that is, such that, if incorporated into the contract, and as applied to the subject-matter, they would be just and appropriate stipulations, and not calculated to throw heavy and disproportionate burdens upon either party. \* \* \* If a usage leads to consequences which are absurd, or which could not be fairly presumed to have been contemplated by the parties, the presumption is repelled, which the law might otherwise make, that it was intended to be adopted as a part of the contract. Therefore, courts of law will not enforce unreasonable or absurd usages, however uniform and well known. Parties, in framing their contracts, have a right to disregard them, and cannot be held to have entered into written stipulations with any reference to them." *Seccomb v. Insurance Co.*, *supra*.

<sup>56</sup> *Blackett v. Assurance Co.*, 2 Crompt. & J. 244; *Caldwell v. Meek*, 17 Ill. 220; *Dixon v. Dunham*, 14 Ill. 324; *Home Ins. Co. v. Favorite*, 46 Ill. 263; *Hedden v. Roberts*, 134 Mass. 38; *Brown v. Foster*, 113 Mass. 136; *Randolph v. Holden*, 44 Iowa, 327; *Greenstine v. Borchard*, 50 Mich. 434, 15 N. W. Rep. 540; *Seavey v. Shurick*, 110 Ind. 494, 11 N. E. Rep. 597; *Sweeney v. Thomason*, 9 Lea (Tenn.) 359; *Wolff v. Campbell*, 110 Mo. 114, 19 S. W. Rep. 622; *O'Donohue v. Leggett*, 134 N. Y. 40, 31 N. E. Rep. 269; *Atkinson v. Allen*, 29 Ind. 375; *Gibney v. Curtis*, 61 Md. 192; *Barker v. Borzone*, 48 Md. 474; *Baltimore Baseball C. & E. Co. v. Pickett* (Md.) 28 Atl. Rep. 279; *Corwin v. Patch*, 4 Cal. 204; *Holloway v. McNear*, 81 Cal. 154, 22 Pac. Rep. 514; *Gilbert v. McGinnis*, 114 Ill. 28, 28 N. E. Rep. 382; *Partridge v. Insurance Co.*, 15 Wall. 573; *Globe Milling Co. v. Elevator Co.*, 44 Minn. 153, 46 N. W. Rep. 306; *George v. Bartlett*, 22 N. H. 490.

such usage, and no evidence of usage can be admitted to contradict the terms of a contract, or control its legal interpretation and effect."<sup>57</sup>

*In Equity.*

In the application of equitable remedies, the granting or refusal of specific performance, the reformation of documents, or their rescission and cancellation, extrinsic evidence is much more freely admitted than at law. For instance, though, as we have seen, a man is ordinarily bound by the terms of an offer unequivocally expressed, and accepted in good faith, evidence has been admitted to show that the offer was made by inadvertence. Thus, where a person, immediately after dispatching an offer to sell several plots of land for a round sum, discovered that by a mistake in adding up the prices of the plots he had offered them for less than he intended, and informed the other party of the mistake without delay, but not before the latter had concluded the contract by acceptance, the court allowed the mistake to be shown, and refused specific performance, leaving the person to whom the offer was made to such remedy by way of damages as he could obtain in the common-law courts.<sup>58</sup>

Again, where a parol contract has been reduced to writing, or where a contract for a sale or lease of lands has been performed by the execution of a lease or conveyance, evidence may be admitted to show that a term of the contract is not the real agreement of the parties; and this is done for two purposes, and under two sets of circumstances.

Where a contract has been reduced to writing, or a deed executed, in pursuance of a previous agreement, and the writing or deed, owing to mutual mistake, fails to express the intention of the parties, a court of equity will rectify or reform the written instrument in accordance with their true intent; and this may be done even though the parties cannot be placed in the position they occupied when the contract was made.<sup>59</sup> Should the original agreement be ambiguous in its terms, extrinsic, and, if necessary, parol, evidence will be admitted to show the true intent of the parties. In such

<sup>57</sup> *Brown v. Foster*, *supra*.

<sup>58</sup> *Webster v. Cecil*, 30 Beav. 62.

<sup>59</sup> *Beauchamp v. Winn*, L. R. 6 H. L. 232; *Murray v. Parker*, 19 Beav. 305.

cases (1) there must have been a genuine agreement;<sup>60</sup> (2) its terms must have been expressed under mutual mistake;<sup>61</sup> and (3) the parol evidence, if the only evidence, must be uncontradicted.

Where the mistake was not mutual, extrinsic evidence is only admitted in certain cases which appear to be regarded as having something of the character of fraud, and is admitted for the purpose of offering to the party seeking to profit by the mistake an option of abiding by a corrected contract, or having the contract annulled. Instances of such cases are where the mistake of one party was caused by the other, though not with any fraudulent intent, and was known to him before his position had been affected by the contract.<sup>62</sup> In these cases it is probable that the court will not reform or correct the instrument unless the parties can be placed in *statu quo*.

### RULES OF CONSTRUCTION.

Thus far in this chapter we have dealt with the admissibility of evidence in relation to contracts in writing. We now come to deal with the rules of construction which govern the interpretation of the contract as it is proven to have been made between the parties.

### SAME—GENERAL RULES.

**249.** The three general rules of construction are that:

- (a) Words are to be understood in their plain and literal meaning, but—

**EXCEPTIONS—**(1) Evidence of usage may vary the usual meaning of words.

- (2) Technical words are to be given their technical meaning.

- (3) The rule is subject to the following rules as to giving effect to the intention of the parties.

<sup>60</sup> *MacKensie v. Coulson*, L. R. 8 Eq. 368.

<sup>61</sup> *Fowler v. Fowler*, 4 De Gex & J. 250.

<sup>62</sup> *Garrard v. Frankel*, 30 Beav. 445; *Harris v. Pepperell*, L. R. 5 Eq. 1.

(b) An agreement should receive that construction which will best effectuate the intention of the parties.

(c) The intention of the parties is to be collected from the whole agreement.

**250.** Subsidiary to these rules are the following, tending to the same end,—that is, the effecting of the intention of the parties:

(a) Obvious mistakes of writing or grammar, including punctuation, will be corrected.

(b) The meaning of general words will be restricted by more specific and particular descriptions of the subject-matter to which they apply.

(c) A contract susceptible of two meanings will be given the meaning which will render it valid.

(d) A contract will, if possible, be construed so as to render it reasonable rather than unreasonable.

(e) Words will generally be construed most strongly against the party who used them.

(f) In case of doubt, weight will be given the construction placed upon the contract by the parties.

(g) Where there is a conflict between printed and written words, the latter will control.

(1) The first general rule is that words are to be understood in their plain and literal meaning; and this rule is followed, though the consequences may not have been in the contemplation of the parties.<sup>63</sup> The rule, however, is subject to the qualification that a particular custom or usage, which, as we have seen, may be proven, may, vary the usual meaning of words;<sup>64</sup> and that technical

<sup>63</sup> *Hawes v. Smith*, 12 Me. 429; *Bullock v. Lumber Co.* (Cal.) 31 Pac. Rep. 367; *Mansfield & S. C. R. Co. v. Veeder*, 17 Ohio, 385; *Hall v. Bank*, 53 Md. 120; *Taylor v. Turley*, 33 Md. 500; *Pillsbury v. Locke*, 33 N. H. 96; *Holmes v. Hall*, 8 Mich. 66; *Stettauer v. Hamlin*, 97 Ill. 312; *Stearns v. Sweet*, 78 Ill. 446; *Bradshaw v. Bradbury*, 64 Mo. 334; *Abbott v. Gatch*, 13 Md. 314; *Willmering v. McGaughey*, 30 Iowa, 205.

<sup>64</sup> *Ante*, p. 580.



words are to be given their technical meaning.<sup>66</sup> It is also subject to the rules, which we will now explain, as to giving effect to the intention of the parties.

(2, 3) The second and third rules may be mentioned together, namely, that an agreement ought to receive that construction which will best effectuate the intention of the parties; and this intention must be collected, not from detached parts of the agreement, but from the whole agreement.<sup>67</sup> "Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent."<sup>67</sup> Where

<sup>66</sup> *Ante*, p. 582; *Findley v. Findley*, 11 Grat. (Va.) 434; *Ellmaker v. Ellmaker*, 4 Watts (Pa.) 89; *Maryland Coal Co. v. Cumberland & P. R. Co.*, 41 Md. 343; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *McAvoy v. Long*, 13 Ill. 147; *Rindskoff v. Barrett*, 14 Iowa, 101.

<sup>67</sup> *Mallan v. May*, 13 Mees. & W. 511, 517; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122; *Flagg v. Eames*, 40 Vt. 18; *Gray v. Clark*, 11 Vt. 583; *Heywood v. Perrin*, 10 Pick. (Mass.) 228; *Rich v. Lord*, 18 Pick. (Mass.) 322; *Field v. Leiter*, 118 Ill. 17, 6 N. E. Rep. 877; *Walker v. Douglas*, 70 Ill. 445; *Chicago, B. & Q. R. Co. v. City of Aurora*, 99 Ill. 205; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. Rep. 26; *Hunter v. Miller*, 6 B. Mon. (Ky.) 612; *Walsh v. Trevanlon*, 15 Q. B. 733; *Bell v. Bruen*, 1 How. 169; *Goosey v. Goosey*, 48 Miss. 210. Where, for instance, several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other; and the different parts of one instrument will be read together. *Wood v. College*, 114 Ind. 320, 16 N. E. Rep. 619; *Morss v. Salisbury*, 48 N. Y. 636; *Thomson v. Beal*, 48 Fed. Rep. 614; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. Rep. 26; *Pensacola Gas Co. v. Lotze*, 23 Fla. 368, 2 South. Rep. 609; *Hagerty v. White*, 69 Wis. 317, 34 N. W. Rep. 92; *Knowles v. Toone*, 96 N. Y. 534; *Jackson v. McKenny*, 3 Wend. (N. Y.) 233; *Collins v. Lavalle*, 44 Vt. 230; *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. Rep. 79; *Bailey v. Railroad Co.*, 17 Wall. 96; *Holbrook v. Finney*, 4 Mass. 566; *Hunt v. Livermore*, 5 Pick. (Mass.) 395; *Pierce v. Tidwell*, 81 Ala. 299, 2 South. Rep. 15; *Byrd v. Ludlow*, 77 Va. 483; *Gardt v. Brown*, 113 Ill. 475; *Freer v. Lake*, 115 Ill. 662, 4 N. E. Rep. 512; *Greenbaum v. Gage*, 61 Ill. 46; *Wood v. Bibbins*, 58 Ind. 392.

<sup>67</sup> *Ford v. Beach*, 11 Q. B. 852, 866; *Canal Co. v. Hill*, 15 Wall. 94; *Hoffman v. Insurance Co.*, 32 N. Y. 405; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. Rep. 26; *Walker v. Douglas*, 70 Ill. 445; *Robinson v. Stow*, 39 Ill. 568; *Collins v. Lavelle*, 44 Vt. 230; *First Nat. Bank v. Gerke*, 68 Md. 449, 13 Atl. Rep. 358; *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 3 Atl. Rep. 306; *Hunter v. Miller*, 6 B. Mon. (Ky.) 612; *Gage v. Tirrell*, 9 Allen (Mass.) 299. If, for instance, it clearly appears that a word was used inadvertently, or is inconsistent with the real intention of the parties, it will be rejected. *Wells v. Tregusan*, 2 Salk. 463; *Doll-*

the intention clearly appears from the words used, there is no need to go further, for in such a case the words must govern; or, as it is sometimes said, where there is no doubt, there is no room for construction.<sup>55</sup> But, if the meaning is not clear, the court will consider the circumstances under which the contract was made, the subject-matter, the relation of the parties, and the object of the agreement, in order to ascertain their intention, and for this purpose, as we have seen, parol evidence is admissible.<sup>56</sup>

These rules seem to be in conflict with the rule first stated. Taking them together they come substantially to this: that men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear. The courts will not make an

man v. King, 4 Bing. (N. C.) 105; Buck v. Burk, 18 N. Y. 337; Stockton v. Turner, 7 J. J. Marsh. (Ky.) 192; Hibbard v. McKindley, 28 Ill. 240; Iredell v. Barbee, 9 Ired. (N. C.) 250. In Wells v. Tregusan, *supra*, a bond recited a debt due from the obligor to the obligee, but the condition was that the bond should be void if the obligor do "not" pay, etc. It was held that the word "not" should be rejected as repugnant to the recital of indebtedness.

<sup>55</sup> Dwight v. Insurance Co., 103 N. Y. 341, 8 N. E. Rep. 654; Benjamin v. McConnell, 4 Gilman (Ill.) 536; Canterbury v. Miller, 76 Ill. 355; Walker v. Tucker, 70 Ill. 527; Noyes v. Nichols, 28 Vt. 159; Williamson v. McClure, 37 Pa. St. 402.

<sup>56</sup> Roberts v. Bonaparte, 73 Md. 191, 20 Atl. Rep. 918, and authorities there cited. And see Nash v. Towne, 5 Wall. 689; Reed v. Insurance Co., 95 U. S. 23; Mason v. Spaulding, 7 Mackey (D. C.) 115; Caperton v. Caperton, 36 W. Va. 479, 15 S. E. Rep. 257; Penfold v. Insurance Co., 85 N. Y. 317; Wilson v. Roots, 119 Ill. 379, 10 N. E. Rep. 204; Kuecken v. Voltz, 110 Ill. 264; Wood v. Clark, 121 Ill. 359, 12 N. E. Rep. 271; Thomas v. Wiggers, 41 Ill. 470; Edelman v. Yeakel, 27 Pa. St. 26; Lacy v. Green, 84 Pa. St. 514; Excelsior Needle Co. v. Smith, 61 Conn. 56, 23 Atl. Rep. 693; Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. Rep. 566. Thus, where a policy of marine insurance excepted the time "while the vessel is at Baker's Island loading," and the vessel was lost while there, but before it had begun to load, it was held, after evidence of the dangerous character of the place, that the intention of the parties was to except the time while the vessel was there for the purpose of loading, and not merely while it was actually loading. Reed v. Insurance Co., *supra*.

agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words.

### *Subsidiary Rules.*

Subsidiary to these three main rules there are various others, all tending to the same end,—the effecting of the intention of the parties so far as it can be discovered. They may be shortly stated as follows:

(1) Courts, both of law and equity, will correct obvious mistakes in writing and grammar.<sup>70</sup> This rule includes another, namely, that the punctuation of a document, though it may aid in determining the meaning, will not control or change a meaning which is plain from a consideration of the whole document and the circumstances.<sup>71</sup>

(2) The court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply.<sup>72</sup>

(3) Where a particular word, or the contract as a whole, is susceptible of two meanings, one of which will render the contract valid, and the other of which will render it invalid, the former will be adopted so as to uphold the contract. Thus, where a document was expressed to be given "in consideration of your being in advance" to a person, and it was argued that this showed a past consideration which would not support the promise, the court held that the words "being in advance" might mean a

<sup>70</sup> *Wilson v. Wilson*, 5 H. L. Cas. 40, at page 66; *Watson v. Blaine*, 12 Serg. & R. (Pa.) 131; *Wallis Ironworks v. Association* (N. J. Err. & App.) 26 Atl. Rep. 140; *Atwood v. Cobb*, 16 Pick. (Mass.) 227; *Phipps v. Tanner*, 5 Car. & P. 488; *Morey v. Homan*, 10 Vt. 565; *Fowle v. Bigelow*, 10 Mass. 379; *Harman v. Howe*, 27 Grat. (Va.) 676; *De Soto v. Dickson*, 34 Miss. 150; *Caldwell v. Layton*, 44 Mo. 220; *Knisely v. Shenberger*, 7 Watts (Pa.) 193; *Fowler v. Woodward*, 26 Minn. 347, 4 N. W. Rep. 231; *Butler v. Bohn*, 31 Minn. 325, 17 N. W. Rep. 862.

<sup>71</sup> *White v. Smith*, 33 Pa. St. 186; *Ewing v. Burnet*, 11 Pet. 41; *English v. McNair*, 34 Ala. 40; *Osborn v. Farwell*, 87 Ill. 89.

<sup>72</sup> *Phillips v. Barber*, 5 Barn. & Ald. 161; *Cullen v. Butler*, 5 Maule & S. 461; *Stettauer v. Hamlin*, 97 Ill. 312; *Hammerquist v. Swensson*, 44 Ill. App. 627; *Dawes v. Prentice*, 16 Pick. (Mass.) 435; *Ellery v. Insurance Co.*, 8 Pick. (Mass.) 14; *Emery v. Fowler*, 38 Me. 99; *Vaughan v. Porter*, 16 Vt. 261.

prospective advance, and be equivalent to "in consideration of your being in advance," or "on condition of your being in advance."<sup>73</sup> So, also, where a contract is susceptible of two constructions, one of which will render it unlawful as being in violation of law or contrary to public policy, that construction which will render it lawful will be adopted.<sup>74</sup>

(4) If possible without going contrary to the manifest intention of the parties, a contract will be so construed as to render it reasonable rather than unreasonable.<sup>75</sup>

(5) The courts will construe words most strongly against the party who used them. Words in an offer, for instance, will be construed most strongly against the proposer, and words in an acceptance most strongly against the acceptor; words in a promissory note most strongly against the maker; words in a policy of insurance most strongly against the insurer; and words in a conveyance, particularly of exception or reservation, most strongly against the grantor.<sup>76</sup> The principle on which this rule is based has been

<sup>73</sup> *Haigh v. Brooks*, 10 Adol. & E. 326. And see *Atwood v. Cobb*, 16 Pick. (Mass.) 227; *Anderson v. Baughman*, 7 Mich. 69; *Thrall v. Newell*, 19 Vt. 202; *Field v. Leiter*, 118 Ill. 17, 6 N. E. Rep. 877; *Peckham v. Haddock*, 86 Ill. 38; *Gano v. Aldridge*, 27 Ind. 294; *Riely v. Chouquette*, 18 Mo. 220; *Hunter v. Anthony*, 8 Jones (N. C.) 385; *Saunders v. Clark*, 29 Cal. 299; *Hughes v. Lane*, 11 Ill. 123; *Wells v. Atkinson*, 24 Minn. 161.

<sup>74</sup> *Archibald v. Thomas*, 3 Cow. (N. Y.) 284; *Ormes v. Dauchey*, 82 N. Y. 443; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235, 6 Sup. Ct. Rep. 1038; *Lorillard v. Clyde*, 86 N. Y. 384; *Merrill v. Melchoir*, 30 Miss. 516; *Crittenden v. French*, 21 Ill. 598.

<sup>75</sup> *Atwood v. Emery*, 1 C. B. (N. S.) 110; *Russell v. Allerton*, 108 N. Y. 288, 15 N. E. Rep. 391; *Clay v. Ballard*, 9 Rob. (Ia.) 308; *Wilson v. Marlow*, 66 Ill. 385; *Crabtree v. Hagenbaugh*, 25 Ill. 233; *Royalton v. Turnpike Co.*, 14 Vt. 311; *Bickford v. Cooper*, 41 Pa. St. 142.

<sup>76</sup> *Barney v. Newcomb*, 9 Cush. 46; *Noonan v. Bradley*, 9 Wall. 394; *Jackson v. Gardner*, 8 Johns. (N. Y.) 308; *Duryea v. New York*, 62 N. Y. 592; *Hoffman v. Insurance Co.*, 32 N. Y. 405; *Varnum v. Thruston*, 17 Md. 471; *Richardson v. People*, 85 Ill. 495; *Sharp v. Thompson*, 100 Ill. 447; *Massie v. Belford*, 68 Ill. 290; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Deblois v. Earle*, 7 R. I. 26; *Waterman v. Andrews*, 14 R. I. 589; *Hill v. Manufacturing Co.*, 79 Ga. 105; 3 S. E. Rep. 445; *Evans v. Sanders*, 8 Porter (Ala.) 497; *Phoenix Ins. Co. v. Slaughter*, 12 Wall. 404. The rule does not apply where it would cause a penalty or forfeiture. A condition in a bond, for instance, is construed most strongly against the obligee. *Butler v. Wigge*, 1 Saund. 65;

said to be that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."<sup>77</sup>

(6) Where the meaning of the terms used is clear, the fact that the parties have themselves, by their subsequent conduct or otherwise, placed an erroneous construction upon them, will not prevent the court from giving the true construction;<sup>78</sup> but, where the meaning is doubtful, such construction by the parties is of great weight in determining the true meaning, and in some cases may be controlling.<sup>79</sup>

(7) Where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the

*Hoffman v. Insurance Co.*, 32 N. Y. 405; *Bennehan v. Webb*, 6 Ired. (N. C.) 57; *Chicago, B. & Q. R. Co. v. Aurora*, 99 Ill. 205. As to the exception to this rule in the case of grants from the government, see ante, p. 214.

<sup>77</sup> *Fowkes v. Manchester & L. Assur. & L. Ass'n*, 3 Best & S. 929.

<sup>78</sup> *Railroad Co. v. Trimble*, 10 Wall. 367; *Holston Salt & Plaster Co. v. Campbell*, 89 Va. 396, 16 S. E. Rep. 274; *Hershey v. Luce*, 56 Ark. 320, 19 S. W. Rep. 963, and 20 S. W. Rep. 6; *St. Paul & D. R. Co. v. Blackmar*, 44 Minn. 514, 47 N. W. Rep. 172; *Citizens' Ins. Co. v. Doll*, 35 Md. 89; *Bishop v. White*, 68 Me. 104; *Davis v. Sexton*, 35 Ill. App. 407; *Davis v. Shafer*, 50 Fed. Rep. 764. Since a contract may be made by conduct as well as words, the parties, by their conduct subsequent to an agreement, may modify it, or make a new contract. *Holloway v. Frick*, 149 Pa. St. 178, 24 Atl. Rep. 201. It must also be noted that the conduct of one of the parties may estop him as against the other.

<sup>79</sup> *French v. Pearce*, 8 Conn. 439; *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. Rep. 1057; *Railroad Co. v. Trimble*, 10 Wall. 367; *Staples v. Lumber Co.* (Minn.) 57 N. W. Rep. 220; *Mitchell v. Wedderburn*, 68 Md. 139, 11 Atl. Rep. 760; *Hosmer v. McDonald* (Wis.) 49 N. W. Rep. 112; *Davis v. Shafer*, 50 Fed. Rep. 764; *Leavitt v. Investment Co.*, 4 C. C. A. 425, 54 Fed. Rep. 439; *People's Gas Co. v. Wire Co.*, 155 Pa. St. 22, 25 Atl. Rep. 749; *Hill v. City of Duluth* (Minn.) 58 N. W. Rep. 992; *People v. Murphy*, 119 Ill. 159, 6 N. E. Rep. 488; *Garrison v. Nute*, 87 Ill. 215; *Leavers v. Cleary*, 75 Ill. 349; *Union Pac. R. Co. v. Anderson*, 11 Colo. 293, 18 Pac. Rep. 24; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. Rep. 254; *District v. Gallagher*, 124 U. S. 505, 8 Sup. Ct. Rep. 585; *First Nat. Bank v. Jagger*, 41 Minn. 308, 43 N. W. Rep. 70.

printing and the writing, the latter will control.<sup>66</sup> The reason of this is obvious.

*Terms Implied—Unexpressed Intention.*

In the civil law, certain contracts are said to be *stricti juris*, or of strict right or law, and are strictly construed, while others are said to be *bonae fidei*, and are liberally construed. In the former, the exact language, literally and logically interpreted, determines the right conferred and the liability imposed, while, in the latter, certain terms are implied by law, though not expressed. Such a distinction is in effect made in our law also. The contracts of suretyship and guaranty may be said to belong to the former class. The liability of a guarantor or surety is to be determined by a strict interpretation of the words used, and cannot be extended by implication. On the other hand, most contracts belong to the latter class,—those denominated by the civil law as ‘*bonae fidei*.’ Certain terms, though unexpressed, are imported into the contract by law without proof that they were intended by the parties. Unless a contrary intention was expressed, the law conclusively presumes that they intended to make them a part of their contract. If they did not expressly exclude them, they cannot say they did not intend to make them a part of the contract. “The unexpressed obligations in these instances, which are implied by law, are those which are inherent in the transaction according to its true nature, and may be regarded as the unexpressed intention of the parties. \* \* \* It is generally said that contracts will be construed according to the intention of the parties. But this means, not only what they did actually intend, but also what, according to the essential nature of the particular transaction, the law considers that they should have intended. No intention can, however, be read into a contract unless it is thus a necessary legal implication. \* \* \* When a particular kind of contract is made, it is presumed that the parties intended to embody all the legal consequences of the act, whether they knew of them or not, unless it

<sup>66</sup> *Clark v. Woodruff*, 83 N. Y. 518; *Chadsey v. Gulon*, 97 N. Y. 333; *Thornton v. Railroad Co.*, 84 Ala. 109, 4 South. Rep. 197; *People v. Dulaney*, 96 Ill. 503; *American Exp. Co. v. Pinckney*, 29 Ill. 392; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. Rep. 99; *Hutt v. Zimmer*, 28 N. Y. Supp. 1014; *Hernandez v. Insurance Co.*, 6 Blatchf. 317, Fed. Cas. No. 6415.

can be seen from the language they used that they intended to exclude some of them."<sup>81</sup>

This principle is illustrated by an ordinary contract of sale. In all such contracts, in the absence of expression to the contrary, it is conclusively presumed that the seller intended to stipulate that he had the title to the property and the right to sell it, and that there were not, to his knowledge, any latent defects. These implied stipulations are called "implied warranties." Though unexpressed, they are imported into the contract by implication of law.

### SAME—RULES AS TO TIME.

251. At common law, time is always of the essence of a contract; but in equity it is otherwise, unless it was intended by the parties to make time of the essence, and their intention is expressed. In the absence of such intention, the rule is that a reasonable time was meant. In some jurisdictions, by statute, the rule at law is the same as in equity.

At common law, time is always of the essence of the contract; that is to say, if a person promises another to do a certain thing by a certain day, in consideration that the latter will do something for him, the thing must be done by the date named, or the latter is discharged from his promise. Courts of equity, however, look further into the intention of the parties, so as to ascertain whether, in fact, the performance of the contract by one party was meant to depend upon the other party's promise being fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time. If the latter was found to be the intention of the parties, equity would not refuse to enforce the contract if the promise required to be so performed was performed within a reasonable time.<sup>82</sup> It is always open to

<sup>81</sup> *Brantly*, Cont. 178, 179; *Genet v. Canal Co.*, 136 N. Y. 593, 32 N. E. Rep. 1078.

<sup>82</sup> *Malthy v. Austin*, 65 Wis. 527, 27 N. W. Rep. 162; *Bellas v. Hays*, 5 Serg. & R. (Pa.) 427; *Moote v. Scriven*, 33 Mich. 500; *Andrews v. Sullivan*, 2 Gilman (Ill.) 827; *Garretson v. Vanloon*, 3 G. Greene (Iowa) 128; *Taylor v. Baldwin*, 27 Ga. 438; *Young v. Daniels*, 2 Iowa, 126.

the parties, however, even in equity, according to the weight of authority, to make time of the essence of the contract by express agreement.<sup>88</sup> In some of the states, even where time is expressly declared to be of the essence of the contract, courts of equity will disregard the stipulation if its enforcement would be unconscionable, and it even seems that, in Michigan at least, the stipulation will be disregarded, without regard to the intention of the parties.<sup>89</sup>

In England, and in some of our states, the distinction in this respect between the rules of law and equity has been swept away by statutes declaring, substantially, that stipulations in contracts as to time or otherwise, which would not theretofore have been deemed as of the essence of such contracts in a court of equity, should receive in all courts the same construction and effect as they would have received in equity.

Where time is not made of the essence of the contract by express stipulation, it may nevertheless be held to have been intended

<sup>88</sup> *Lennon v. Napper*, 2 Schrales & L. 682; *Barnard v. Lee*, 97 Mass. 92; *Carter v. Phillips*, 144 Mass. 100, 10 N. E. Rep. 500; *Kemp v. Humphrey*, 36 Ill. 33; *Potter v. Tuttle*, 22 Conn. 512; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. Rep. 498; *Wells v. Smith*, 7 Paige (N. Y.) 22; *Grigg v. Landis*, 21 N. J. Eq. 494; *Garretson v. Vanloon*, 3 G. Greene (Iowa) 128; *Scott v. Fields*, 7 Ohio, pt. II, p. 90; *Falls v. Carpenter*, 1 Dev. & B. 237; *Reed v. Breeden*, 61 Pa. St. 460; *Grey v. Tubbs*, 43 Cal. 359; *Kirby v. Harrison*, 2 Ohio St. 326; *Young v. Daniels*, 2 Iowa, 126; *Bullock v. Adams*, 20 N. J. Eq. 367; *Hays v. Hall*, 4 Port. (Ala.) 374; *Morgan v. Bergen*, 3 Neb. 209. Even where time is expressly declared to be of the essence of a contract, it may be waived by the conduct of the party for whose benefit the stipulation is made; as, for instance, where he recognizes the contract as still in force after the time for performance has passed, or directs changes making a longer time necessary. *Brown v. Safe-Deposit Co.*, 128 U. S. 414, 9 Sup. Ct. Rep. 127; *Phillips & Colby Const. Co. v. Seymour*, 91 U. S. 646; *Amoskeag Manuf'g Co. v. U. S.*, 17 Wall. 592; *Paddock v. Stout*, 121 Ill. 571, 13 N. E. Rep. 182; *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. Rep. 450. If the party prevents performance by the other, he cannot insist on the stipulation. *Danat v. Fuller*, 120 N. Y. 554, 24 N. E. Rep. 815; *King, etc., Manuf'g Co. v. City of St. Louis*, 43 Fed. Rep. 768; *Rees v. Logsdon*, 68 Md. 93, 11 Atl. Rep. 708; *Ward v. Matthews*, 73 Cal. 13, 14 Pac. Rep. 604; post, p. 674.

<sup>89</sup> *Richmond v. Robinson*, 12 Mich. 183; *Cole v. Wells*, 49 Mich. 453, 13 N. W. Rep. 813; *Austin v. Wacks*, 30 Minn. 335, 15 N. W. Rep. 409; *Quinn v. Roath*, 37 Conn. 16; *Ballard v. Cheney*, 19 Neb. 58, 26 N. W. Rep. 587.



from the nature of the contract. In mercantile contracts, such as contracts for the manufacture and sale of goods, and the like, it is generally so held.<sup>55</sup> In contracts for the sale of land, or for the performance of services, or the construction of buildings, time will be held of the essence if, from the nature of the property and the circumstances, it seems that the parties must have so intended, but generally, in such contracts, time is not of the essence.<sup>56</sup>

#### **SAME—RULES AS TO PENALTIES AND LIQUIDATED DAMAGES.**

**252. If the parties fix upon a certain sum to be paid on breach of the contract,**

- (a) It may be recovered if it was really fixed upon as liquidated damages for nonperformance. This is subject to the rules of construction stated below.
- (b) But, if it was intended in the nature of a penalty in excess of any loss likely to be sustained, the recovery will be limited to the loss actually sustained.

**253. In determining whether the sum named is a penalty or liquidated damages, these rules may be stated:**

<sup>55</sup> *Bowes v. Shand*, 2 App. Cas. 455; *Jones v. U. S.*, 90 U. S. 24; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. Rep. 882; *Cromwell v. Wilkinson*, 18 Ind. 365; *Camden Iron Works v. Fox*, 34 Fed. Rep. 200; *Scarlett v. Stein*, 40 Md. 512.

<sup>56</sup> *Brown v. Trust Co.*, 128 U. S. 403, 9 Sup. Ct. Rep. 127; *Goldsmith v. Guild*, 10 Allen (Mass.) 230; *Green v. Covilland*, 10 Cal. 317; *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. Rep. 646; *Young v. Daniels*, 2 Iowa, 126; *Derrett v. Bowman*, 61 Md. 526. "In contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation." *Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co.*, 3 C. C. A. 248, 52 Fed. Rep. 700; *Tayloe v. Sandiford*, 7 Wheat. 13; *Hambly v. Railroad Co.*, 21 Fed. Rep. 541; post, p. 661.

- (a) The courts will not be guided by the name given to it by the parties.
- (b) If the matter of the contract is of certain value, a sum in excess of that value is a penalty.
- (c) If the matter is of uncertain value, the sum fixed is liquidated damages.
- (d) If a debt is to be paid by installments, it is no penalty to make the whole debt due on nonpayment of an installment.
- (e) If some terms of the contract are of certain value, and some are not, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages.

Where the parties to a contract affix a penalty to the nonperformance of his promise by one or each of them, they may have intended to effect either of two purposes: They may have intended (1) to assess the damages at which they rated the nonperformance of the promise, or (2) to secure its performance by imposing a penalty in excess of the actual loss likely to be sustained. If the former was their intention, and, according to the rules to be presently mentioned, can be reasonably construed to have been their intention, the sum named is recoverable as "liquidated damages," on breach of the promise. If the latter was their actual or presumed intention, the amount recoverable is limited to the loss actually sustained, in spite of the sum undertaken to be paid by the person who breaks the contract. Formerly, this rule existed only in equity, but for a long time it has been also applied in the courts of law.<sup>87</sup>

#### *Rules of Construction.*

In construing contracts in which such a term is introduced, the courts will not be guided by the name given to the sum to be paid. If it is liquidated damages, they will enforce it, though erroneously called a "penalty," and, on the other hand, if it is in the nature of a penalty, they will not allow it to be enforced, al-

<sup>87</sup> *Watts v. Camora*, 115 U. S. 353, 6 Sup. Ct. Rep. 91; *Taylor v. Sandiford*, 7 Wheat. 13.

though the parties have expressly stated that it is to be paid as "liquidated damages," and not as a "penalty."<sup>88</sup>

For determining this question of construction, the following rules may be laid down:

(1) If the contract is for a matter of certain value, or value easily ascertainable, and a sum in excess of that value is fixed to be paid on breach of it, the sum so fixed is a penalty, and not liquidated damages.<sup>89</sup>

(2) If the contract is for a matter of uncertain value, and a sum is fixed to be paid on breach of it, and is not so greatly in excess of the actual damage as to show that the parties could not have fixed upon it otherwise than as a penalty, the sum is recoverable as liquidated damages. There is "nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree."<sup>90</sup> If the stipulation is so construed, the plaintiff is limited

<sup>88</sup> *Ward v. Building Co.*, 125 N. Y. 230, 26 N. E. Rep. 256; *Bagley v. Peddie*, 16 N. Y. 469; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. Rep. 829; *Myer v. Hart*, 40 Mich. 517; *Shute v. Taylor*, 5 Metc. (Mass.) 61; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *Cheddick v. Marsh*, 21 N. J. Law, 463; *Baird v. Tolliver*, 6 Humph. (Tenn.) 186; *Spear v. Smith*, 1 Denio (N. Y.) 464.

<sup>89</sup> *Clement v. Railroad Co.*, 132 Pa. St. 445, 19 Atl. Rep. 274; *Brennan v. Clark*, 29 Neb. 385, 45 N. W. Rep. 472; *Squires v. Elwood* (Neb.) 45 N. W. Rep. 939; *Geiger v. Railroad Co.*, 41 Md. 4; *Hough v. Kugler*, 36 Md. 186.

<sup>90</sup> *Kemble v. Farren*, 6 Bing. 147; *Poppers v. Meager*, 148 Ill. 192, 35 N. E. Rep. 805; *Perkins v. Lyman*, 11 Mass. 76; *Maxwell v. Allen*, 78 Me. 32, 2 Atl. Rep. 386; *Daily v. Litchfield*, 10 Mich. 29; *Keeble v. Keeble*, 85 Ala. 552, 5 South. Rep. 149; *Berry v. Wisdom*, 3 Ohio St. 241; *Cushing v. Drew*, 97 Mass. 445; *Tennessee Manuf'g Co. v. James*, 91 Tenn. 154, 18 S. W. Rep. 262; *Niver v. Rossman*, 18 Barb. (N. Y.) 50; *Fasler v. Beard*, 39 Minn. 32, 38 N. W. Rep. 755; *Whitefield v. Levy*, 35 N. J. Law, 149; *Lansing v. Dodd*, 45 N. J. Law, 525; *Trower v. Elder*, 77 Ill. 452; *Morse v. Rathbun*, 42 Mo. 598; *Dwinel v. Brown*, 54 Me. 468; *Curry v. Larer*, 7 Pa. St. 470; *Shreve v. Brereton*, 51 Pa. St. 175; *Pennypacker v. Jones*, 106 Pa. St. 237. Stipulation in a building or construction contract for payment by the contractor of a certain sum for each day that the work remains uncompleted after a certain day will be construed as liquidated damages if reasonable. *Legge v. Harlock*, 12 Q. B. 1015; *Hall v. Crowley*, 5 Allen (Mass.) 304; *Ward v. Building Co.*, 125 N. Y. 230, 26 N. E. Rep. 256; *Walle's Iron Works v. Association* (N. J. Err. & App.) 26 Atl. Rep. 140; *Lincoln v. Granite Co.*, 56 Ark. 405, 19 S. W. Rep. 1056; *De Graff v. Wickham* (Iowa) 52 N. W. Rep. 503; *Fletcher v.*

to the amount named, though his actual damages may be greater."<sup>1</sup>

In a number of cases it has been laid down as the rule that if the contract is for a matter of uncertain value, and a sum is fixed to be paid upon a breach of it, the sum is recoverable as "liquidated damages," without the qualification above mentioned,—that the difference between the sum fixed upon and the actual damages must not be so great as to show that the parties could not have intended merely to fix upon what they thought might be the damages; but the rule thus stated has been justly criticised. According to the better opinion, the parties, even if they intended to fix upon the amount stipulated as liquidated damages, will nevertheless be limited to the recovery of actual damages if the amount stipulated for is so greatly in excess of the actual damages that it is in effect a penalty. In other words, the real question is "not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it."<sup>2</sup>

Dyche, 2 Term R. 32; *Fruin v. Railway Co.*, 89 Mo. 397, 14 S. W. Rep. 557; *Worrell v. McClinaghan*, 5 Strob. (S. C.) 115; *Texas & St. L. Ry. Co. v. Rust*, 19 Fed. Rep. 239. A contract to build a bridge for a city, which provides that, if the work is not completed at a certain time, the builders will pay the city, as liquidated damages, the sum of \$50 for each and every day beyond that time, will be upheld, since the damages to the public by a delay in construction are uncertain, and not capable of being easily ascertained. *Malone v. City of Philadelphia*, 147 Pa. St. 416, 23 Atl. Rep. 628. But see, contra, where the stipulation was greatly in excess of any possible damage from the delay, *Cochran v. Railway Co.* (Mo. Sup.) 21 S. W. Rep. 6; *Clement v. Railroad Co.*, 182 Pa. St. 445, 19 Atl. Rep. 276.

<sup>1</sup> *Winch v. Ice Co.*, 86 N. Y. 618; *Welch v. McDonald*, 85 Va. 500, 8 S. E. Rep. 711.

<sup>2</sup> *Jaquith v. Hudson*, 5 Mich. 123. This case gives a full statement and explanation of the law on this subject. See, also, *Myer v. Hart*, 40 Mich. 517; *Moore v. Colt*, 127 Pa. St. 289, 18 Atl. Rep. 8; *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. Rep. 527; *Brewster v. Edgerly*, 13 N. H. 275; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. Rep. 829; *Cotheal v. Talmage*, 9 N. Y. 551; *Clement v. Cash*, 21 N. Y. 253; *Colwell v. Lawrence*, 38 N. Y. 71. "The intention is not all controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it" *Streeper v. Williams*, 48 Pa. St. 450.

(3) If a debt is to be paid by installments, it is not imposing a penalty to provide that on default in any one payment the entire balance of unpaid installments shall fall due.<sup>33</sup>

(4) If the contract contains a number of terms, some of which are of a certain value, or if it contains a number of terms of widely different value, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages, however strongly the parties may have expressed their intention that it shall be so.<sup>34</sup> In a leading case on this point the defendant had agreed to act, and conform to all the regulations, at plaintiff's theater for several seasons, the plaintiff to pay him £3. 6s. 8d. for every night that the theater should be open for performance, and it was

<sup>33</sup> *Protector Loan Co. v. Grice* (Ct. App.) 5 Q. B. Div. 592; *Dean v. Wilson*, 10 Wall. 158. The same is true of a stipulation in a contract to pay money that, if the interest is not paid when due, the principal shall become due. *Schooley v. Romain*, 31 Md. 574; *Mobray v. Leckie*, 42 Md. 474.

<sup>34</sup> *Kemble v. Farren*, 6 Bing. 141; *Carter v. Strom*, 41 Minn. 522, 43 N. W. Rep. 394; *Watts v. Camora*, 115 U. S. 353, 6 Sup. Ct. Rep. 91; *McPherson v. Robertson*, 82 Ala. 459, 2 South. Rep. 333; *Lampman v. Cochran*, 16 N. Y. 275; *Wilhelm v. Eaves*, 21 Colo. 194, 27 Pac. Rep. 1053; *Hough v. Kugler*, 36 Md. 186; *Dally v. Litchfield*, 10 Mich. 29; *Trustees v. Walrath*, 27 Mich. 232; *Trower v. Elder*, 77 Ill. 452; *Lyman v. Babcock*, 40 Wis. 503; *Monmouth Park Ass'n v. Warren* (N. J. Err. & App.) 27 Atl. Rep. 932. "There is little or no dissent from the following propositions: When a sum in gross is promised to be paid on the breach of a promise to pay a smaller sum, or on the failure to do an act or perform a duty, the damages for the failure to do or perform which can be ascertained by a satisfactory rule or standard, then the sum promised is a penalty, and not a sum certain to be recovered in numero. When the act or duty to be performed is entirely of a class, the damages for the breach of which cannot be ascertained proximately by any standard or known rule, then a promise to pay a gross sum on the breach or nonperformance of such obligation is agreed compensation or liquidated damages. \* \* \* There is another class somewhat intermediate. Agreements sometimes contain more stipulations than one, and then express a promise to pay a gross sum on the breach of such agreement. The sum thus expressed and promised is treated as the agreed compensation or recoverable damages for an entire breach of all the stipulations, and hence not recoverable in gross for a partial breach, and consequently are not liquidated damages. And this rule applies where, as in this case, some of the stipulations are of a class for whose breach there is no known or satisfactory rule for estimating the damages, provided there are other stipulations, one or more, to which a known rule or standard of damages can be applied." *McPherson v. Robertson*, *supra*.

agreed that, for a breach of any term of the agreement by either party, the one in default should pay the other £1,000, "to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount, and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof." The court held that, in spite of the explicit statement of the parties that the sum was not to be regarded as a penalty, it must be so regarded. If the penal clause had been limited to breaches uncertain in their nature and amount, it might, as was thought, have had the effect of ascertaining the damages; "but," it was said, "in the present case the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3. 6s. 8d. per day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theater, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement." \*\*

#### **SAME—JOINT AND SEVERAL CONTRACTS.**

254. Whether or not a contract with several persons on either or both sides is to be construed as joint or several depends upon the intention of the parties as manifested in the evidence of their agreement. The following rules may be stated:

**LIABILITIES**—(a) A promise by two or more in the plural number is *prima facie* joint, while a

\*\* *Kemble v. Farren*, 6 Bing. 141.

promise in the singular is *prima facie* several; but this presumption will yield if, from the whole agreement, a contrary intention appears.

(b) Subscriptions by a number of persons to promote some common enterprise, though joint in form, are several promises.

**RIGHTS**—If the words will admit of it, the contract, as regards the promisees, will be joint or several, according as their interest is joint or several.

Where several persons join in a contract in respect of the same matter, the question whether they do so jointly as one party, or severally as distinct parties entering into several distinct contracts, or, in the case of the persons bound, jointly and severally, making a joint contract and several distinct contracts at the same time, depends on the intention of the parties as manifested in the evidence of the contract.<sup>66</sup> Some rules for the construction of contracts in this respect have been laid down by the authorities.

*Joint and Several Liabilities.*

In all written contracts, the language used is the primary guide to the meaning; but it is not always conclusive. The language is sometimes ambiguous, and often not exclusive of an intention to contract either way. In such cases the sense must be derived from the interests and relations of the parties as appearing in the contract. The same is true of oral contracts where there is no direct evidence of the intention. In all cases the intention of the parties is to be sought, and must govern. Wherever the debt is payable by two or more persons, as where the words "we promise," etc., are used, the liability is *prima facie* joint, and not several, nor joint and several; but the use of such expressions will not make the promise joint if, from the whole instrument, a contrary intention appears.<sup>67</sup> Where the promise is in the singular, the liability is

<sup>66</sup> 1 Para. Cont. 10; *Hall v. Leigh*, 8 Cranch, 50; *Olmstead v. Bailey*, 35 Conn. 584; *Eastman v. Wright*, 6 Pick. (Mass.) 316; *Willoughby v. Willoughby*, 5 N. H. 244; *Boggs v. Curtin*, 10 Serg. & R. (Pa.) 211.

<sup>67</sup> *King v. Hoare*, 13 Mees. & W. 494; *Bartlett v. Robbins*, 5 Metc. (Mass.) 184; *Ehle v. Purdy*, 6 Wend. (N. Y.) 629; *New Haven & N. Co. v. Hayden*, 119 Mass. 361.

*prima facie* several; but, as in other cases, the whole instrument may show a contrary intention, and this intention must govern.<sup>99</sup>

In the case of subscriptions by a number of persons to promote some common enterprise, the promises, though joint in form, are held to be several. Each subscriber is held to promise severally to pay the amount of his subscription, and an action against all the subscribers jointly will not lie. It clearly appears from the character of such a contract that each subscriber only intends to bind himself for his own subscription, and this intention must prevail, notwithstanding the joint form of the promise.<sup>100</sup>

As we have seen, these rules are to a great extent modified by statute in most of the states.<sup>100</sup>

#### *Joint and Several Rights.*

With respect to the rights of several persons under such contracts, the rule of construction has been thus stated:<sup>101</sup> "A contract will be construed to be joint or several, according to the interests of the parties, if the words are capable of that construction, or even if not inconsistent with it. If the words are ambiguous, or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several.<sup>102</sup> But a contract entered into with several persons, in respect of the same matter or interest, cannot by any words be made so as to entitle them both jointly and severally."<sup>103</sup>

<sup>99</sup> *March v. Ward*, Peake, 130; *Dill v. White*, 52 Wis. 456, 9 N. W. Rep. 404; *Fond du Lac Harrow Co. v. Haskins*, 51 Wis. 135, 8 N. W. Rep. 15; *Van Alstyne v. Van Slyck*, 10 Barb. (N. Y.) 387; *Hemmenway v. Stone*, 7 Mass. 58; *Slater v. Magraw*, 12 Gill & J. (Md.) 265.

<sup>100</sup> *Davis v. Belford*, 70 Mich. 120, 37 N. W. Rep. 919; *Price v. Railroad Co.*, 18 Ind. 137; *Hall v. Thayer*, 12 Metc. (Mass.) 130; *Davis & Rankin Bldg. & Manuf'g Co. v. Barber*, 51 Fed. Rep. 148; *Gibbons v. Bente* (Minn.) 53 N. W. Rep. 756. *Contra*, *Davis v. Shafer*, 50 Fed. Rep. 764.

<sup>101</sup> *Ante*, p. 554.

<sup>102</sup> *Leake*, Cont. 218.

<sup>103</sup> *Eccleston v. Clipsham*, 1 W. Saund. 153; *Sorsbie v. Park*, 12 Mees. & W. 146; *Pickering v. De Rochemont*, 45 N. H. 67; *Gould v. Gould*, 6 Wend. (N. Y.) 263; *Appleton v. Bascom*, 3 Metc. (Mass.) 169; *Capen v. Barrows*, 1 Gray (Mass.) 376; *Lombard v. Cobb*, 14 Me. 222.

<sup>104</sup> *Ante*, p. 561, note 127. On the question of joint and several liability, see *ante*, p. 554 et seq.



**CHAPTER XL****DISCHARGE OF CONTRACT.**

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- 258-259. Waiver, Cancellation, or Rescission.
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- 287-291. Damages.
- 292. Specific Performance.
- 293. Discharge of Right of Action.
- 294. By the Consent of the Parties.
- 295. By Judgment.
- 296-297. By Lapse of Time.

**IN GENERAL.**

255. The modes in which a contract may be discharged are as follows:

- (a) It may be discharged by the same process which created it; that is, by mutual agreement.

- (b) It may be performed; and all the duties undertaken by either party may be thereby fulfilled, and all the rights satisfied.
- (c) It may be broken, in which case a new obligation connects the parties,—a right of action possessed by the one against the other.
- (d) It may become impossible by reason of certain circumstances which are held to exonerate the parties from their respective obligations.
- (e) It may be discharged by the operation of rules of law upon certain sets of circumstances.

Thus far we have dealt with the elements which go to the formation of a contract, with the operation of a contract when formed, and with its interpretation when it comes into dispute. It remains now for us to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. In dealing with this part of the subject we shall consider, not only the mode in which the original contract may be discharged, but, in case of its being discharged by breach, the mode in which the right of action arising thereupon may be extinguished. The modes of discharge have been stated in a general way in the black-letter text, but it will be necessary for us to take up each mode in turn, and deal with it in detail.

#### DISCHARGE OF CONTRACT BY AGREEMENT.

**256.** A contract may be discharged by an agreement to that effect between the parties. This may be—

- (a) By waiver, cancellation, or rescission.
- (b) By a substituted agreement.
- (c) By the happening of conditions subsequent, expressed or implied in the contract.

**257.** Necessarily, such an agreement must possess all the elements requisite to the formation of any other valid agreement. There are some exceptions as to the necessity for consideration, which will be hereafter noticed.

We have seen that the essential feature of the contractual obligation is that it results from the voluntary act of the parties expressed by their agreement. As it is their agreement which binds them, so by their agreement they may be loosed from the contractual tie. It is scarcely necessary to say that to render an agreement effective as a discharge it must be a valid agreement; and, to be so, it must be accompanied by all the elements, such as communication of mutual intention, real consent, parties having capacity, etc.<sup>1</sup> This applies to all the modes of discharge by agreement, with which we shall hereafter deal. The question of consideration will be discussed in dealing with the particular divisions of the subject.

#### **SAME—WAIVER, CANCELLATION, OR RESCISSION.**

**258. A contract may be discharged by an express agreement that it shall no longer bind either party. This process is called a waiver, cancellation, or rescission of the contract.**

**259. A consideration is necessary to support such an agreement, except:**

**EXCEPTIONS—(a) Where the agreement is under seal.**

**(b) A negotiable instrument may be discharged by its mere surrender with an intent to discharge it.**

A contract may always be discharged by an agreement between the parties to it that it shall no longer be binding upon them; but this agreement is subject to the rule which governs all other simple contracts,—that there must be a consideration. In the absence of a consideration, a promise to forego the right to demand performance of a contract would be nudum pactum and void. It has often been said that “a simple contract may, before breach, be waived or discharged without a deed and without consideration;”

<sup>1</sup> *Murray v. Harway*, 50 N. Y. 337; *Wheeler v. Railroad Co.*, 115 U. S. 29, 5 Sup. Ct. Rep. 1061, 1160; *Stix v. Roulston*, 88 Ga. 743, 15 S. E. Rep. 826; *O'Donnell v. Brand* (Wis.) 55 N. W. Rep. 154; *Wood v. Moriarty*, 16 R. I. 201, 14 Atl. Rep. 855; *Lauer v. Lee*, 42 Pa. St. 105; *Smith v. Watson*, 82 Va. 712, 1 S. E. Rep. 96.

but this is inaccurate. A consideration, or a deed dispensing with the necessity for a consideration, is always essential. Where the contract is wholly executory, a mere agreement, without more, between the parties, that it shall no longer bind them, is valid, for the discharge of each party by the other from his liabilities under the contract is a sufficient consideration for the promise of the other to forego his rights.<sup>2</sup> No further consideration is necessary. If the agreement is not mutual,—that is, if it is a waiver of his rights by one party only,—there is no consideration, and the agreement is void.<sup>3</sup> If a contract has been executed on one side, an agreement that it shall no longer be binding, without more, is void for want of consideration.<sup>4</sup> There must be some consideration, or else the agreement must be under seal. To illustrate these distinctions: If a person agrees to buy goods from another, or perform services for him, and the other agrees to pay therefor, the contract may be discharged by a simple agreement to that effect, so long as the goods or services have not been delivered or performed, and the money has not been paid. After delivery of the goods, however, or performance of the services, or payment of the money, a promise by the party so performing not to require performance by the other would not be binding unless under seal or supported by a consideration.

In England there is an exception to this rule in the case of bills of exchange and promissory notes. The rights of the holder of

<sup>2</sup> *Rollins v. Marsh*, 128 Mass. 116; *Cutter v. Cochrane*, 116 Mass. 408; *Collyer v. Moulton*, 9 R. I. 90; *Blood v. Enos*, 12 Vt. 625; *Kelly v. Bliss*, 54 Wis. 187, 11 N. W. Rep. 488; *Blagborne v. Hunger* (Mich.) 59 N. W. Rep. 657; *Perkins v. Hoyt*, 35 Mich. 506; *McNish v. Reynolds*, 95 Pa. St. 483; *Flegal v. Hoover*, 156 Pa. St. 276, 27 Atl. Rep. 162; *King v. Gillett*, 7 Mees. & W. 55; *Tallman v. Earle* (Com. Pl. N. Y.) 13 N. Y. Supp. 805; *Farrar v. Tolliver*, 88 Ill. 408; *Hobbs v. Brick Co.*, 157 Mass. 109, 31 N. E. Rep. 756; *Windham v. Doles*, 59 Ga. 265; ante, p. 187.

<sup>3</sup> *King v. Gillett*, 7 Mees. & W. 55.

<sup>4</sup> *Collyer v. Moulton*, 9 R. I. 90; *Crawford v. Millsbaugh*, 13 Johns. (N. Y.) 87; *Kidder v. Kidder*, 33 Pa. St. 268; *Moore v. Locomotive Works*, 14 Mich. 266; *Maness v. Henry*, 96 Ala. 454, 11 South. Rep. 410; *Landon v. Hutton*, 50 N. J. Eq. 500, 25 Atl. Rep. 963; *Davidson v. Burke*, 143 Ill. 139, 32 N. E. Rep. 514; *Murphy v. Kastner*, 50 N. J. Eq. 214, 24 Atl. Rep. 564; *Saeger v. Runk*, 148 Pa. St. 77, 23 Atl. Rep. 1006; ante, p. 189, and cases there cited.

such instruments may there be waived and discharged without any consideration for their waiver.<sup>5</sup> In this country the exception is not recognized. Such instruments, in this respect, stand on the same footing as any other simple contract,<sup>6</sup> with this exception, namely, that, if the instrument itself is destroyed or surrendered for the purpose of discharging the debt, it will so operate without any consideration.<sup>7</sup> The reason for the exception is that there is a valid executed gift of the instrument; such instruments, it seems, being regarded as the contract, and not merely the evidence of the contract.<sup>8</sup>

It is sometimes said that there may be a waiver of part of a contract; but this is a discharge by substituted agreement, which we shall now explain.

#### SAME—SUBSTITUTED AGREEMENT.

**260.** A contract may be discharged by the substitution of a new contract; and this results—

- (a) Where a new contract is expressly substituted for the old one.
- (b) Where a new contract is inconsistent with the old one.
- (c) Where new terms are agreed upon, in which case a new contract results, consisting of the new terms and of the terms of the old contract which are consistent with them.

<sup>5</sup> *Foster v. Dawber*, 6 Exch. 839.

<sup>6</sup> *Crawford v. Millspaugh*, 13 Johns. (N. Y.) 87; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169; *Bragg v. Danielson*, 141 Mass. 195, 4 N. E. Rep. 622; *Bender v. Sampson*, 11 Mass. 42; *Smith v. Bartholomew*, 1 Metc. (Mass.) 276; *Shaw v. Pratt*, 22 Pick. (Mass.) 305; *Campbell's Estate*, 7 Pa. St. 100.

<sup>7</sup> *Larkin v. Hardenbrook*, 90 N. Y. 333; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. Rep. 351; *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. Rep. 168; *Vanderbeck v. Vanderbeck*, 90 N. J. Eq. 265; *Paxton v. Wood*, 77 N. C. 11; *Campbell's Estate*, 7 Pa. St. 100; *Albert v. Ziegler*, 29 Pa. St. 50; *Stewart v. Hadden*, 18 Minn. 43 (Gil. 29); *Ellsworth v. Fogg*, 35 Vt. 353.

<sup>8</sup> *Slade v. Mutrie*, *supra*.

(d) Where a new party is substituted for one of the original parties by agreement of all three.

261. As in the case of contracts generally, the agreement of the parties may be evidenced by their conduct.

Another mode by which a contract may be discharged by agreement of the parties is by the substitution of a new contract.<sup>9</sup> The difference between this mode and a discharge by waiver is that a discharge by waiver is a total obliteration of the contract, while by this mode a new bond between the parties is substituted in the place of the old one. A contract may be thus discharged either by the making of an entirely new and independent contract relating to the same subject, or merely by the introduction of new terms. In the latter case the new contract consists of the new terms and so much of the original contract as remains unchanged. If, for instance, parties who have contracted for the construction of a building according to certain specifications, and at a certain price, to be paid partly in cash and partly in some other way, should afterwards agree upon a change in the specifications and an increase in the cash payment, there would be substituted for the original contract a new contract, consisting of the new terms and the unchanged terms of the original.<sup>10</sup>

There need be no express waiver of the old contract, or of some of its terms, to constitute a discharge by substituted agreement. A new contract inconsistent with the original impliedly discharges

\* *McCreery v. Day*, 119 N. Y. 1, 23 N. E. Rep. 198; *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *Hurlock v. Smith*, 39 Md. 436; *King v. Faist* (Mass.) 37 N. E. Rep. 456; *Rollins v. Marsh*, 128 Mass. 116; *Weld v. Nichols*, 17 Pick. (Mass.) 538; *Cutter v. Cochrane*, 116 Mass. 408; *Low v. Forbes*, 18 Ill. 568; *Farrar v. Tolliver*, 88 Ill. 408; *Ward v. Walton*, 4 Ind. 75; *Windham v. Doles*, 59 Ga. 265; *Perkins v. Hoyt*, 35 Mich. 506; *Brown v. Everhard*, 52 Wis. 205, 8 N. W. Rep. 725; *Smith v. Tunno*, 1 McCord, Eq. (S. C.) 443; *Tingley v. Land Co.* (Wash.) 36 Pac. Rep. 1098. As to payment by note, check, or other contract, see post, p. 631.

<sup>10</sup> *Greene v. Paul*, 155 Pa. St. 126, 25 Atl. Rep. 867; *Hannibal H. Chandler & Co. v. Knott*, 86 Iowa, 113, 53 N. W. Rep. 88; *McNish v. Reynolds*, 95 Pa. St. 483.

the latter without an express provision to that effect;<sup>11</sup> and, if new terms are agreed upon, they will by implication waive those terms of the original which are inconsistent with them, and a new contract will result, consisting, as we have seen, of the new terms and the unchanged or consistent terms of the original contract.<sup>12</sup> An illustration of implied discharge by the introduction of terms inconsistent with those of the original agreement is furnished by cases in which a contractor undertakes building operations for another which are to be completed by a certain time, in default of which a sum is to be paid as compensation for the delay. If, while the building is in progress, an agreement is made between the parties for additional work, by which it becomes impossible to complete the building within the time originally stipulated, it is universally held that the subsequent agreement is so far inconsistent with the first as to amount to a waiver of the original stipulation as to time; and, since an agreement may be made by conduct as well as by express words, this principle would apply to a case where performance within the specified time is prevented by the conduct of the other party.<sup>13</sup>

Where it is claimed that a contract has been discharged by a new contract, or by the introduction of new terms, the intention to discharge the original contract must distinctly appear, to give rise to such an implication, from the inconsistency of the new terms with the old ones.<sup>14</sup> A mere postponement of performance for

<sup>11</sup> *Patmore v. Colburn*, 1 Crompt., M. & R. 66; *Renard v. Sampson*, 12 N. Y. 561; *Bacon v. Cobb*, 45 Ill. 47; *Stow v. Russell*, 36 Ill. 18; *Howard v. Railroad Co.*, 1 Gill (Md.) 311; *Chrisman v. Hodges*, 75 Mo. 413; *Paul v. Meservey*, 55 Me. 419; *Harrison v. Lodge*, 116 Ill. 279, 5 N. E. Rep. 543.

<sup>12</sup> *Thornhill v. Neats*, 8 C. B. (N. S.) 831; *Teal v. Bilby*, 123 U. S. 572, 8 Sup. Ct. Rep. 239; *Cornish v. Suydam* (Ala.) 13 South. Rep. 118; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. Rep. 598; *Farrar v. Tolliver*, 88 Ill. 408; *Rollins v. Marsh*, 128 Mass. 116; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. Rep. 122; *Huckestein v. Kelly*, 152 Pa. St. 631, 25 Atl. Rep. 747.

<sup>13</sup> *Thornhill v. Neats*, *supra*. And see *Cornish v. Suydam* (Ala.) 13 South. Rep. 118; *Stewart v. Keteltas*, 36 N. Y. 388; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. Rep. 598; *Howard v. Railroad Co.*, 1 Gill (Md.) 311; *Huckestein v. Kelly*, 152 Pa. St. 631, 25 Atl. Rep. 747.

<sup>14</sup> *Millsaps v. Bank* (Miss.) 13 South. Rep. 903.

the convenience of one of the parties, or an agreement to accept performance at a different place than that stipulated, does not operate as a discharge.<sup>15</sup> This question sometimes arises in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, and then refuses to accept the goods at all, alleging that the contract was discharged by the alteration of the time of performance; that a new contract was thereby substituted, which is void for noncompliance with the statute of frauds. The courts, however, have always recognized "the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another,"<sup>16</sup> and will not regard the latter as affecting the rights of the parties further than this: that, if a man asks to have performance of his contract postponed, he does so at his own risk; for, if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place, or when, by nonperformance, the contract was broken, or when he ultimately exhausted the patience of the vendor, and definitely refused to perform the contract.<sup>17</sup>

Again, a contract may be discharged by the introduction of new parties into the original agreement, whereby a new contract is created, in which the terms remain the same, but the parties are different. This is termed a "novation." We have already spoken of it as an apparent exception to the rule that the rights and liabilities under a contract cannot be assigned at law.<sup>18</sup> Such a substitution may be made (1) by an express agreement, or (2) by the conduct of the parties indicating an acquiescence in a change of liability. If, for instance, as we have already seen, A. owes B. \$100, and B. owes C. \$100, it may be agreed between all three parties that A. shall pay C. instead of paying B., so that B. thereby

<sup>15</sup> *Hickman v. Haynes*, L. R. 10 C. P. 606; *Lawson v. Hogan*, 93 N. Y. 39; *Watkins v. Hodges*, 6 Har. & J. (Md.) 38; *Franklin Ins. Co. v. Hamill*, 5 Md. 170; *Bacon v. Cobb*, 45 Ill. 47; *McCombs v. McKennan*, 2 Watts & S. (Pa.) 216.

<sup>16</sup> *Hickman v. Haynes*, *supra*.

<sup>17</sup> *Anson*, Cont. 261; *Ogle v. Earl Vane*, L. R. 2 Q. B. 275, L. R. 3 Q. B. 272.

<sup>18</sup> *Ante*, p. 527.



terminates his legal relations with both parties.<sup>10</sup> In such a case there is the necessary consideration for each party's promise. The consideration for A.'s promise to pay C. is the discharge of B. by C.; the consideration of B.'s discharge of A. is the extinguishment of his debt to C.; and the consideration of C.'s discharge of B. is the promise of A. It would not be enough for A. to say to C., "I will pay you instead of B.," and to afterwards suggest the arrangement to B. and receive his assent;<sup>11</sup> nor would it be enough for B. to authorize A. in writing to pay to C., and for A. to acknowledge the paper.<sup>12</sup> All three of the parties must enter into the agreement, and the original liability must be extinguished. This is essential, because it is the promise of each that is the consideration for the promise of the others.<sup>13</sup>

<sup>10</sup> *Tatlock v. Harris*, 3 Term R. 174; *Heaton v. Angler*, 7 N. H. 397; *Sterling v. Ryan*, 72 Wis. 36, 37 N. W. Rep. 572; *York v. Orton*, 65 Wis. 6, 26 N. W. Rep. 166; *Guichard v. Brande*, 57 Wis. 534, 15 N. W. Rep. 764; *McKinney v. Alvia*, 14 Ill. 33; *Leihy v. Briggs*, 33 Ill. App. 534; *Seymour v. Seymour*, 31 Ill. App. 227; *Grieb v. Comstock* (Mich.) 58 N. W. Rep. 497; *Litchfield v. Garrett*, 10 Mich. 426; *Mulcrone v. Lumber Co.*, 55 Mich. 622, 22 N. W. Rep. 67; *Finan v. Babcock*, 58 Mich. 301, 25 N. W. Rep. 294; *McClellan v. Robe*, 93 Ind. 296; *Parsons v. Tillman*, 95 Ind. 452; *Mulgrew v. Cocharen*, 96 Mich. 422, 56 N. W. Rep. 70; *Id.*, 98 Mich. 532, 57 N. W. Rep. 739; *Atwood v. Town of Mt. Holly*, 65 Vt. 121, 26 Atl. Rep. 401; *Byrd v. Bertrand*, 7 Ark. 321; *Foster v. Paine*, 63 Iowa, 85, 18 N. W. Rep. 699.

<sup>11</sup> *Cuxon v. Chadley*, 3 Barn. & C. 591; *Barnes v. Insurance Co. (Minn.)* 57 N. W. Rep. 314.

<sup>12</sup> *Liversidge v. Broadbent*, 4 Hurl. & N. 603. See quotation from this case, ante, p. 528.

<sup>13</sup> *Liversidge v. Broadbent*, supra; *Cuxon v. Chadley*, supra; *Wood v. Moriarty*, 16 R. I. 201, 14 Atl. Rep. 855; *First Nat. Bank v. Hall*, 101 U. S. 50; *Barnes v. Insurance Co. (Minn.)* 57 N. W. Rep. 314; *Hard v. Burton*, 62 Vt. 314, 20 Atl. Rep. 269; *Lynch v. Austin*, 51 Wis. 287, 8 N. W. Rep. 129; *Murphy v. Hanrahan*, 50 Wis. 485, 7 N. W. Rep. 436; *Spycher v. Werner*, 74 Wis. 456, 43 N. W. Rep. 161; *McKinney v. Alvia*, 14 Ill. 33; *Reid v. Degener*, 82 Ill. 508; *Home Nat. Bank v. Waterman*, 134 Ill. 461, 29 N. E. Rep. 503; *Charles v. Amos*, 10 Colo. 272, 15 Pac. Rep. 417; *Smith v. Watson*, 82 Va. 712, 1 S. E. Rep. 96; *Black v. De Camp*, 78 Iowa, 718, 43 N. W. Rep. 625; *Bowen v. Railroad Co.*, 34 S. C. 217, 13 S. E. Rep. 421; *Haubert v. Mausshardt*, 89 Cal. 433, 26 Pac. Rep. 899; *Horn v. McKinney*, 5 Ind. App. 348, 32 N. E. Rep. 334; *Morrison v. Kendall*, 6 Ind. App. 212, 33 N. E. Rep. 370; *Ferguson v. McBean* (Cal.) 35 Pac. Rep. 559; *Linneman v. Moross* (Mich.) 57 N. W. Rep. 103; *Chapin v. Brown* (Cal.) 34 Pac. Rep. 525; *Campbell v. Clay* (Colo. App.) 36 Pac. App. 909; *Irwin v. Atkins*, 7

As we have said, such a substitution and discharge may arise otherwise than by express agreement; it may arise from the conduct of the parties indicating acquiescence in a change of liability. If a person, for instance, enters into a contract with two others, and the latter agree between themselves that one of them shall retire from the contract and cease to be liable upon it, the first-mentioned party may either insist upon the continued liability of the party remaining, or may treat the contract as broken and discharged by such renunciation of his liabilities by the party so attempting to withdraw. If, however, under some circumstances, the first-mentioned party, after he becomes aware of the retirement of one of the other parties, continues to deal with the remaining party as though no change has taken place, he acquiesces, and may be considered to have entered into a new contract to accept the sole liability of the party so remaining, and cannot hold the other to his original contract. Cases of this sort arise where a member retires from a partnership, after the firm has entered into a contract, and it is subsequently sought to hold him liable thereon. In a leading English case the plaintiff had employed the defendant, with other members of a firm, as his bankers. The defendant retired, and though notice of his retirement was shown to have reached the plaintiff, or to have been accessible to him, he continued to bank with the firm. Finally, the firm became bankrupt, and the plaintiff sued the defendant as liable to him on the original contract, as being one of the members of the firm

Ill. App. 17; *Butterfield v. Hartshorn*, 7 N. H. 345. There must be an extinguishment of the old debt by a mutual agreement between all parties, whereby it becomes the obligation of the new debtor. The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor. *Cornwell v. Megins*, 39 Minn. 407, 40 N. W. Rep. 610. The pre-existing debt must be extinguished; otherwise there is no novation. If it be only modified in some parts, and any stipulation of the original obligation be suffered to remain, it is no novation. It is not presumed, and the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt. *Levy v. Ford*, 41 La. Ann. 873, 6 South. Rep. 671. But see *Clough v. Giles*, 64 N. H. 73, 5 Atl. Rep. 835, where it was held that when the acceptor of an assignment of future wages informs the assignee, after the wages are due, that he will pay them to him, there is a novation. And see *Wolters v. Thomas* (Cal.) 32 Pac. Rep. 565; *Casey v. Miller* (Idaho) 32 Pac. Rep. 105.

whom he had employed. The jury found that the defendant's retirement was sufficiently brought to plaintiff's notice, and, as he had still continued to employ the firm, the court held that a new contract had been formed between the plaintiff and the remaining members. "I apprehend the law to be now settled," said Parke, B., "that if one partner goes out of a firm, and another comes in, the debts of the old firm may, by the consent of all the three parties,—the creditor, the old firm, and the new firm,—be transferred to the new firm."<sup>23</sup>

In the case of discharge by substituted agreement, the change of rights and liabilities, and consequent extinction of those which before existed, form the consideration on each side for the new contract.<sup>24</sup> We have seen that a promise by a person to do something which he is already bound to do is no consideration for a promise by another. Applying this principle, it would seem that, if a person should refuse to perform a contract simply because he would suffer a loss by performing, a promise by the other party to pay him more, or to accept less, than originally agreed upon, to induce him to go on with the contract, would be without consideration. We have already discussed this question in treating of consideration, and have seen that by the weight of authority it is not so regarded.<sup>25</sup> The mutual discharge of liability under the old contract, and mutual assumption of liability under the new, is held a sufficient consideration for the new agreement.<sup>26</sup>

<sup>23</sup> *Hart v. Alexander*, 2 Mees. & W. 484. And see *Luddington v. Bell*, 77 N. Y. 138; *Filippini v. Stead* (Super. N. Y.) 23 N. Y. Supp. 1061; *Powers v. Mann*, 156 Mass. 375, 31 N. E. Rep. 10; *Ayer v. Kilner*, 148 Mass. 468, 20 N. E. Rep. 163. But see *Wadhams v. Page*, 1 Wash. St. 420, 25 Pac. Rep. 462; *Id.*, 6 Wash. 103, 32 Pac. Rep. 1068; *Campbell v. Floyd*, 153 Pa. St. 84, 25 Atl. Rep. 1033. Where a creditor of a partnership, after dissolution thereof, accepts the note of some of the partners in payment of the debt of the firm, intending that it shall satisfy the original obligation, the other partner is discharged. *Waddell v. Luer*, 3 Denio (N. Y.) 410; *Millard v. Thorn*, 56 N. Y. 402; *Luddington v. Bell*, *supra*; *Powell v. Charles*, 34 Mo. 485; *Stone v. Chamberlain*, 20 Ga. 259; *Maxwell v. Day*, 45 Ind. 509. If there is no such intention, however, there is no discharge. Post, p. 632, note 64.

<sup>24</sup> Note 9, *supra*.

<sup>25</sup> Ante, p. 187.

<sup>26</sup> *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *Rollins v. Marsh*, 128 Mass. 116; *Osborne v. O'Reilly*, 42 N. J. Eq. 467, 9 Atl. Rep. 209; *Moore v. Detroit Loco-*

**SAME—FORM OF DISCHARGE BY NEW AGREEMENT.**

**262.** The general rule is that a contract must be discharged in the same form as that in which it was made. Therefore,

- (a) A contract under seal can only be discharged by agreement, where the agreement is under seal; but—

**EXCEPTIONS—**(1) The parties to a contract under seal may make a parol contract creating obligations separate from but substantially at variance therewith; and which will be binding.

- (2) The rule does not apply to a parol extension of the time for performing a sealed contract, which has been acted upon by the obligor, where the obligee seeks to take advantage of a nonperformance which he has thus caused.

- (3) Nor, by the weight of authority, in this country, at least, does it apply where a parol contract rescinding or modifying a contract under seal has been acted upon, so that it would be inequitable to hold the parties to their original contract.

- (4) Some of the courts allow a sealed contract to be discharged by parol after it has been broken, though not before.

- (b) A parol contract may be discharged by writing or by word of mouth, whether or not the original contract is in writing, except that—

**EXCEPTION—**Where the original written contract was within the statute of frauds.

*motive Works*, 14 Mich. 266; *Goebel v. Lynn*, 47 Mich. 489. 11 N. W. Rep. 284; *Coyner v. Lynde*, 10 Ind. 282; *Cooke v. Murphy*, 70 Ill. 96; *Connelly v. Devoe*, 37 Conn. 570; *Lawrence v. Davey*, 28 Vt. 264; *Lattimore v. Harsen*, 14 Johns. (N. Y.) 330; *Holmes v. Doane*, 9 Cush. (Mass.) 135. But see ante, p. 187, note 128.

though an absolute discharge by rescission or cancellation may take place by word of mouth, a discharge by substituted agreement must, by the weight of authority, be in writing. As to this, however, there is some conflict of opinion.

The general rule of the common law being that a contract can only be discharged in the same form as that in which it was made, it follows that an agreement, to operate as a discharge or modification of a previous contract under seal, must also be under seal. The parties to a deed cannot, at common law, discharge their obligation by a parol agreement.<sup>27</sup> To this rule there are several exceptions.

In the first place, it is possible for them to make a parol contract which creates obligations separate from, and yet substantially at variance with, the deed, so that it in effect contravenes the terms of the deed, and gives a right of action to which the deed furnishes no answer. In a case illustrative of this point a person had let rooms to another, by contract under seal, for a certain time, at a rent to be ascertained in a certain way, and after his death his administrator had entered into a parol agreement with the lessee by which, in consideration of a certain sum to be paid by the lessee, to be taken as a reasonable rent, neither party should be called upon to perform his part under the deed. The lessee failed to make the payment so agreed upon, and the administrator sued him upon the parol contract. The lessee claimed that the parol contract was an attempt to vary the deed by an instrument not under seal, and that a performance of this contract, being no discharge of the deed, would leave him liable to his obligation under the deed. The court held, however, that the parol contract created a new

<sup>27</sup> *West v. Blakeway*, 2 Man. & G. 729; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628; *Thompson v. Brown*, 7 Taunt. 656; *Spence v. Healey*, 8 Exch. 668; *Cordwert v. Hunt*, 8 Taunt. 596; *Albrecht v. Kraisinger*, 44 Ill. App. 313; *Woodruff v. Dobbins*, 7 Blackf. (Ind.) 582; *Hogencamp v. Ackerman*, 24 N. J. Law, 133; *McMurphy v. Garland*, 47 N. H. 316; *Chapman v. McGrew*, 20 Ill. 101; *Hume v. Taylor*, 63 Ill. 43.

obligation, and was not an attempt to vary an old one; that a performance of this new contract would furnish a good equitable answer to an action on the contract under seal; and that the administrator was entitled to sue on the parol contract.<sup>28</sup>

Another exception is recognized where the obligee does something to prevent performance by the obligor, as where he orally consents to an extension of the time for performance, and the oral waiver is acted upon. When he sues the obligor for nonperformance, he cannot object to parol evidence of his conduct. In a New York case the obligor offered to perform the condition of his bond, but the obligee, by parol, waived such performance at that time. In an action for breach of the condition the obligee was allowed to show the parol waiver. "The plaintiff's conduct," it was said, "can be viewed in no other light than as a waiver of a compliance with the condition of the bond, \* \* \* and I see no infringement of any rule or principle of law in permitting parol evidence of such waiver. It is a sound principle that he who prevents a thing being done shall not avail himself of the nonperformance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would \* \* \* have literally complied with the condition."<sup>29</sup>

There is another exception very generally recognized in this country, though not in England, it seems, in cases where the parol contract has been executed. The cases are not very clear as to the limits of this exception, but they seem to establish the rule that where a contract under seal has been rescinded or modified by a subsequent parol agreement, and this agreement has been acted upon by the parties, and they have changed their situation so that it would be inequitable to hold them to the original contract, the parol agreement may be shown; and this rule is recognized in law as well as in equity.<sup>30</sup> Though the language of most of the opin-

<sup>28</sup> *Nash v. Armstrong*, 10 C. B. (N. S.) 259.

<sup>29</sup> *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528. And see *Nicholas v. Austin*, 82 Va. 817, 1 S. E. Rep. 132; *Franklin Ins. Co. v. Hamill*, 5 Md. 170; *Baltimore Ins. Co. v. McGowan*, 16 Md. 47; *Lawrence v. Miller*, 86 N. Y. 131.

<sup>30</sup> *Chesapeake & O. Canal Co. v. Ray*, 101 U. S. 522; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. Rep. 198; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Allen v. Jaquish*,

ions in these cases is as broad as the rule stated, it will be found that some of them will fall within one or the other of the first two exceptions mentioned above.

In accordance with the general rule above stated, a parol or simple contract may be discharged by writing or by word of mouth. It is immaterial, in such case, whether the original contract is in writing or not, for, as we have seen, the writing is not the agreement, but the evidence of the agreement only.<sup>21</sup> There is an exception in cases where the original agreement was required by the statute of frauds to be in writing. In such a case an absolute dis-

21 Wend. (N. Y.) 628; Le Fevre v. Le Fevre, 4 Serg. & R. (Pa.) 241; Phelps v. Seely, 22 Grat. (Va.) 573; Munroe v. Perkins, 9 Pick. (Mass.) 298; Van Syckel v. O'Hearn, 60 N. J. Eq. 173, 24 Atl. Rep. 1024; White v. Walker, 31 Ill. 422; Mill Dam Foundry v. Hovey, 21 Pick. (Mass.), at page 429; Lawrence v. Dole, 11 Vt. 549; Hydeville Co. v. Eagle Railroad & Slate Co., 44 Vt. 395; Cabe v. Jameson, 10 Ired. (N. C.) 193; Green v. Wells, 2 Cal. 584; Whiting v. Heslep, 4 Cal. 327; Holdsworth v. Tucker, 143 Mass. 369, 9 N. E. Rep. 764; Herzog v. Sawyer, 61 Md. 344; Dickerson v. Commissioners, 6 Ind. 128. Some of the cases cited above make a distinction between discharge of a contract under seal before it is broken, and a discharge after it is broken, holding that in the former case it cannot be discharged by parol; but, according to the better opinion, there is no reason for the distinction. McCreery v. Day, supra; Van Syckel v. O'Hearn, supra; Cabe v. Jameson, supra; Herzog v. Sawyer, supra.

<sup>21</sup> Goss v. Nugent, 5 Barn. & Adol. 65; Brown v. Everhard, 52 Wis. 205, 8 N. W. Rep. 725; Swain v. Seamens, 9 Wall. 254; Maher v. Lumber Co., 86 Wis. 530, 57 N. W. Rep. 357; Blagborne v. Hunger (Mich.) 59 N. W. Rep. 657; Seaman v. O'Hara, 29 Mich. 60; McNish v. Reynolds, 95 Pa. St. 483; Allen v. Sowerby, 37 Md. 410; Wiggin v. Goodwin, 63 Me. 389; Solomons v. Jones, 3 Brev. (S. C.) 54; Aldrich v. Price, 67 Iowa, 151, 9 N. W. Rep. 376, and 10 N. W. Rep. 339; Utley v. Donaldson, 94 U. S. 29; Teal v. Bilby, 123 U. S. 572, 8 Sup. Ct. Rep. 239; Blood v. Enos, 12 Vt. 625; Mlanders v. Fay, 40 Vt. 316; Malone v. Railroad Co., 157 Pa. St. 430, 27 Atl. Rep. 756; Robinson v. Batchelder, 4 N. H. 40; McGrann v. Railroad Co., 20 Pa. St. 82; Thurston v. Ludwig, 6 Ohio St. 1; DeShazo v. Lewis, 5 Stew. & P. (Ala.) 91; Low v. Forbes, 18 Ill. 568; Jones v. Grantham, 80 Ga. 472, 5 S. E. Rep. 764. Contra, by statute, in California, where the oral agreement is unexecuted. Benson v. Shotwell (Cal.) 37 Pac. Rep. 147. See, also, ante, pp. 573, 575. It is immaterial in such a case that the written contract expressly provides that no modifications shall be made except in writing, for this provision itself may be changed by parol. A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co. (Tex. Civ. App.) 27 S. W. Rep. 504.

charge might probably take place by word of mouth.<sup>32</sup> If, however, the discharge is not a simple rescission or cancellation, but is by substitution of a new contract, either by express provision, or by implication because of inconsistency between it and the original, the better opinion requires a writing. The new contract, resting in parol, would be unenforceable for noncompliance with the statute, and could not discharge the original contract.<sup>33</sup> There are some cases in conflict with this statement.<sup>34</sup> Since an oral agreement is not within the statute of frauds if it has been executed, or, in some cases, if it has been partly performed, it would seem obvious that such an agreement would be effective to discharge a prior written contract within the statute, and it has been so held.<sup>35</sup>

#### **SAME—PROVISIONS FOR DISCHARGE CONTAINED IN THE CONTRACT—CONDITIONS SUBSEQUENT.**

**263. A contract may contain within itself express or implied provisions for its determination under certain circumstances. These provisions are conditions subsequent. Such a discharge may take place by reason of—**

<sup>32</sup> *Gorman v. Salisbury*, 1 Vern. 240; *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. Rep. 273; *Hurley v. Schring*, 62 Hun, 621, 17 N. Y. Supp. 7; *Buel v. Miller*, 4 N. H. 196. As to novation, see ante, p. 97.

<sup>33</sup> *Noble v. Ward*, L. R. 2 Exch. 135; *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; *Burns v. Real-Estate Co.*, 52 Minn. 31, 53 N. W. Rep. 1017; *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 200; *Hill v. Blake*, 97 N. Y. 216; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68; *Dana v. Hancock*, 30 Vt. 616; *Packer v. Steward*, 34 Vt. 127; *Abell v. Munson*, 18 Mich. 306; *Rogers v. Atkinson*, 1 Kelly (Ga.) 12; *Musselman v. Stoner*, 31 Pa. St. 265; *Wilson's Assignee v. Beam* (Ky.) 14 S. W. Rep. 362; *Carpenter v. Galloway*, 73 Ind. 418; *Thomson v. Poor*, 57 Hun, 285, 10 N. Y. Supp. 597, and 22 N. Y. Supp. 570; *Moritz v. Koenig*, 1 Misc. Rep. 186, 21 N. Y. Supp. 5; *Schultz v. Bradley*, 57 N. Y. 646; *Rucker v. Harrington*, 52 Mo. App. 481.

<sup>34</sup> *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Cummings v. Arnold*, 3 Metc. (Mass.) 486; *Negley v. Jeffers*, 28 Ohio St. 90; *Lee v. Hawks*, 68 Miss. 669, 9 South. Rep. 823; *McClelland v. Rush*, 150 Pa. St. 57, 24 Atl. Rep. 354. And see *Houston v. Sledge*, 101 N. C. 640, 8 S. E. Rep. 145; *Johnson v. Trask*, 116 N. Y. 136, 22 N. E. Rep. 377; *Blanchard v. Trim*, 38 N. Y. 225; *Browne*, St. Frauds, § 411; 2 *Reed*, St. Frauds, § 458.

<sup>35</sup> *Long v. Hartwell*, 34 N. J. Law, 116; *Norton v. Simonds*, 124 Mass. 19.



- (a) The nonfulfillment of a specified term of the contract.
- (b) The occurrence of a particular event.
- (c) The exercise by one of the parties of an option to determine the contract, the option being given either—
  - (1) By express provision in the contract, or
  - (2) By a custom or usage forming part of the contract.

Another mode in which a contract may be discharged by agreement is where the contract itself contains express or implied provisions for its determination under certain circumstances. These circumstances may be (1) the nonfulfillment of a specified term of the contract; (2) the occurrence of a particular event; (3) the exercise by one of the parties of an option to determine the contract.

*Discharge on Nonfulfillment of Term.*

In the first of these three cases—that in which the nonfulfillment of a specified term of the contract gives to one of the parties the option of treating the contract as discharged—we seem to be approaching very near to the subject of the discharge of contract by breach, for this, too, may arise from the nonfulfillment of a term which the parties consider to be vital to the contract. There is, however, this difference between a nonfulfillment contemplated by the parties, the occurrence of which shall, it is agreed, make the contract determinable at the option of one, and a breach, or nonfulfillment not contemplated or provided for by the parties. In the former case the parties have, while in the latter they have not, looked beyond the immediate objects of the contract. In the former case the default which is to constitute a discharge is specified by the agreement of the parties, while in the latter it must always be a question of fact or of construction whether or not the default was in a matter vital to the contract, so as to operate as a discharge by breach. An illustration of this mode of discharge is afforded where a chattel is sold with the understanding that it may be returned if it is not satisfactory, or does not answer the description given by the seller. In a leading case on this point, a horse had

been sold under a contract by which it was stipulated that, if it did not comply with a certain warranty, the buyer might return it by a specified time. It did not comply with the warranty, and was returned within the time specified, but the seller refused to accept it, because it had been injured, though by no fault of the buyer. It was held that the buyer was entitled to return it. "The effect of the contract," it was said, "was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revert in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property reverted, and he must therefore bear the loss."<sup>36</sup>

So, where a servant is employed for a specified time to carry on the master's business, or do other work, "to the master's satisfaction," the master has the absolute right to discharge him whenever he becomes, in good faith, dissatisfied with him.<sup>37</sup> Some courts hold that the master is the sole judge whether the servant is satisfactory, and that the courts cannot determine whether he was reasonably dissatisfied.<sup>38</sup> Goods may be sold on condition that they are not to be paid for unless the buyer is satisfied, and so it may also be with a contract of hiring. This, however, is an illustration of conditions precedent.<sup>39</sup>

<sup>36</sup> *Head v. Tattersall*, L. R. 7 Exch. 7, 14. And see *Ray v. Thompson*, 12 Cush. (Mass.) 281; *Hunt v. Wyman*, 100 Mass. 198; *Kimball v. Vroman*, 35 Mich. 310; *Buswell v. Bicknell*, 17 Me. 344; *Spickler v. Marsh*, 36 Md. 222; *Miller v. Grove*, 18 Md. 242. It is otherwise where the injury is caused by the fault of the purchaser. *Ray v. Thompson*, 12 Cush. (Mass.) 281. If no time is specified within which the option to rescind the contract must be exercised, a reasonable time is implied. What is a reasonable time must depend, of course, upon the character of the chattel and all the circumstances. *Quinn v. Stout*, 31 Mo. 100; *Hickman v. Shimp*, 109 Pa. St. 16; *Washington v. Johnson*, 7 Humph. (Tenn.) 468.

<sup>37</sup> *Frary v. Rubber Co.*, 52 Minn. 264, 53 N. W. Rep. 1156; *Smith v. Robson* (Com. Pl. N. Y.) 26 N. Y. Supp. 884, 1131.

<sup>38</sup> *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. Rep. 157; *Glyn v. Miner* (Com. Pl. N. Y.) 27 N. Y. Supp. 341; *Allen v. Compress Co.* (Ala.) 14 South. Rep. 362. And see *Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. Rep. 376.

<sup>39</sup> *Post*, p. 634.

*Occurrence of Specified Event.*

The parties may introduce into the terms of their contract a provision that the fulfillment of a condition, or the occurrence of an event, shall discharge them both from further liabilities under the contract. Such a condition subsequent is well illustrated by the case of a bond, which is a promise subject to, or defeasible upon, a condition expressed in the bond. Another illustration is in case of the excepted risks in a charter party. In a contract of that nature the shipowner agrees with the charterer to make the voyage on the terms expressed in the contract, the act of God, fire, collision, and other dangers of the seas, etc., excepted. The occurrence of such an excepted risk releases the shipowner from the strict performance of the contract; and if it should take place while the contract is wholly executory, and frustrate the entire enterprise, the parties are altogether discharged.<sup>40</sup> Another illustration of such conditions is found in contracts with common carriers. Charter parties and bills of lading generally contain exceptions by which the liability of the carrier to deliver the goods is to cease if their loss or destruction is caused by certain perils.<sup>41</sup> Not only may such conditions be expressly stated in the contract, but they may also be implied. A common carrier is said to warrant or insure the safe delivery of goods intrusted to him, but his promise, even with-

<sup>40</sup> *Gelpel v. Smith*, L. R. 7 Q. B. 404; *Graves v. The Calvin S. Edwards*, 1 C. C. A. 533, 50 Fed. Rep. 477. As to when the exception of perils of the sea contained in a charter party will not relieve the shipowner from his obligation, see *Assicurazioni, etc., v. Steamship Co.*, 4 Reports, 33, [1892] 2 Q. B. 652; *Williams v. The Exe*, 6 C. C. A. 410, 57 Fed. Rep. 399; *Crooks v. The Dunbritton*, 61 Fed. Rep. 764; *The Charles J. Willard*, 38 Fed. Rep. 759; *The Nith*, 36 Fed. Rep. 86. As to what constitute perils of the sea, see *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. Rep. 823; *The Curlew*, 51 Fed. Rep. 246; *The Zealandia*, 48 Fed. Rep. 697; *The Giles Loring*, Id. 463; *Evans v. Spreckels*, 45 Fed. Rep. 265; *Barker v. The Swallow*, 44 Fed. Rep. 771; *Christie v. The Craigton*, 41 Fed. Rep. 62; *Bradley Fert. Co. v. The Edwin I. Morrison*, 40 Fed. Rep. 501; *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106; *The Bergenseren*, 36 Fed. Rep. 700.

<sup>41</sup> *Storer v. Gordon*, 3 Maule & S. 306; *Southern Exp. Co. v. Glenn*, 16 Lea (Tenn.) 472, 1 S. W. Rep. 102; *Haas v. Railroad Co.*, 81 Ga. 792, 7 S. E. Rep. 629; *Slater v. Railroad Co.*, 29 S. C. 96, 6 S. E. Rep. 936; *Norris v. Railway Co.*, 23 Fla. 182, 1 South. Rep. 475. See cases cited in preceding and following notes.

out express stipulation, is defeasible upon the occurrence of certain excepted risks, such as the act of God<sup>42</sup> and injuries arising from defects inherent in the thing carried.<sup>43</sup> This limitation of liability is implied in every contract with a common carrier, and the

<sup>42</sup> "By the act of God," it has been said, "is meant any accident produced by physical causes which are irresistible; such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. The act of God excludes all idea of human agency." *Fish v. Chapman*, 2 Ga. 349. In another case it was said that "no matter what degree of prudence may be exercised by the carrier and his servants, although the delusion by which it is baffled, or the force by which it is overcome, be inevitable, yet, if it be the result of human means, the carrier is responsible." *McArthur v. Sears*, 21 Wend. (N. Y.) 190. It will be noticed that in these cases an "act of God" is expressly said to exclude all idea of human agency. Some courts, however, have used the term "act of God" as synonymous with "inevitable accident," or "unavoidable accident." *Neal v. Saunderson*, 2 Smedes & M. (Miss.) 572; *Blythe v. Railroad Co.*, 15 Colo. 333, 25 Pac. Rep. 702; *Crosby v. Fitch*, 12 Conn. 410, 419; *Walpole v. Bridges*, 5 Blackf. (Ind.) 222. Other courts make a distinction on the ground that an inevitable or unavoidable accident may be caused by human agency. *Central Line v. Lowe*, 50 Ga. 509. When an act of God, such as a storm, for instance, arises, the carrier must make every reasonable effort to prevent a loss. If a loss from a storm could have been prevented by such efforts, it is not within the meaning of the term. In an English case the court of common pleas held that, to constitute the "act of God," a loss must arise from "such a direct and violent and sudden and irresistible act of nature" as could not be foreseen, or, if foreseen, prevented. *Nugent v. Smith*, 1 C. P. Div. 19. And see *The Niagara v. Cordes*, 21 How. 7. The court of appeal reversed the decision, and held that "it is not necessary to prove that it was absolutely impossible for the carrier to prevent it; but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented." *Nugent v. Smith*, 1 C. P. Div. 441. See, also, *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176; *Nashville & C. R. Co. v. David*, 6 Heisk. (Tenn.) 261; *Palmer v. Railroad Co. (Cal.)* 35 Pac. Rep. 630; *Morrison v. Davis*, 20 Pa. St. 171; *Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S. E. Rep. 802; *Adams Exp. Co. v. Jackson*, 92 Tenn. 326, 21 S. W. Rep. 666; *Lang v. Railroad Co.*, 154 Pa. St. 342, 26 Atl. Rep. 370; *Black v. Railroad Co.*, 30 Neb. 197, 48 N. W. Rep. 428; *Smith v. Railway Co.*, 91 Ala. 455, 8 South. Rep. 754; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552, 37 N. W. Rep. 462.

<sup>43</sup> *Clarke v. Railroad Co.*, 14 N. Y. 570; *Penn v. Railroad Co.*, 49 N. Y. 204; *Oragin v. Railroad Co.*, 51 N. Y. 61; *Smith v. Railroad Co.*, 12 Allen (Mass.) 531; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165; *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870; *Chicago, S. L. & N. O. R. Co. v. Abels*, 00 Miss. 1017; *Selby v. Railroad Co.*, 113 N. C. 588, 18 S. E. Rep. 88;

occurrence of the risks exonerates him from liability for loss incurred through their agency.<sup>44</sup>

*Discharge Optional with Notice.*

Again, a continuing contract may contain a provision making it determinable at the option of one of the parties, upon certain terms.<sup>45</sup> Where, for instance, a contract of hiring between master and servant, or a contract between principal and agent, provides that it may be terminated by either party on giving a month's notice, and the servant or agent is dismissed on a month's notice, the contract is discharged and not broken.<sup>46</sup> Such terms may be incorporated in contracts, not only expressly, but by the usages of trade. For instance, where a person was employed for a year as agent in his business of a woolen merchant, but was dismissed in the course of a year at a month's notice, and sued his employer for breach of contract, it was found by the jury that there was a custom of the trade that all such engagements were determinable at a month's notice; and the court held that the custom was a part of the contract, and gave the employer the option of determining the contract as he had done.<sup>47</sup> As we have seen, however, a usage can never affect a contract if it is inconsistent with the terms of the contract. If a continuous contract fixes no time during which it is to last, and no time is fixed by law or by usage, it may be determined at the will of either party by notice.<sup>48</sup> A contract of hiring, for instance, if no time is specified, is generally construed as a hiring at will; and the fact that wages are payable at specified periods does not necessarily show that the hiring was for a specified

Hance v. Express Co., 48 Mo. App. 179; Evans v. Railroad Co., 111 Mass. 142; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. Rep. 749; Lindsley v. Railroad Co., 36 Minn. 539, 33 N. W. Rep. 7.

<sup>44</sup> Nugent v. Smith, 1 C. P. Div. 423.

<sup>45</sup> Morrissey v. Broomae, 37 Neb. 706, 56 N. W. Rep. 383; Bour v. Kimball, 40 Ill. App. 827.

<sup>46</sup> Jenkins v. Long, 8 Md. 132. And so it is with any other kind of contract which contains an express provision that it may be terminated at any time on giving notice. Geiger v. Railroad Co., 41 Md. 4. See post, p. 746.

<sup>47</sup> Parker v. Ibbetson, 4 C. B. (N. S.) 347.

<sup>48</sup> Coffin v. Landis, 46 Pa. St. 426; Peacock v. Cummings, 46 Pa. St. 434; Greenburg v. Early, 4 Misc. Rep. 99, 23 N. Y. Supp. 1009; Attrill v. Patterson, 58 Md. 226; Walker v. Denison, 86 Ill. 142.

period.<sup>49</sup> In every contract of hiring, certain provisions for discharge are implied. If the servant proves incompetent, for instance, or if he acts in such a way as to injure the employer's business, or is otherwise guilty of breach of duty, the latter may rightfully discharge him.<sup>50</sup> This, however, is a breach of contract by the servant or agent, and the master or principal is discharged by the breach.<sup>51</sup>

#### DISCHARGE OF CONTRACT BY PERFORMANCE.

##### 264. A contract is discharged by performance—

- (a) Where a promise has been given upon an executed consideration, and is performed by the promisor.
- (b) Where one promise has been given in consideration of another, and both are performed.

Performance of a contract which amounts to an extinction of the obligation must be distinguished from performance which discharges one, only, of the parties from further liabilities under it. Where a promise has been given upon an executed consideration, the promisee has performed his part in the formation of the contract, and performance of his promise by the promisor discharges the contract. All has been done on both sides that could be required to be done under the contract. Where the contract is wholly executory,—that is, where one promise has been given in consideration of another,—performance by one party does not discharge

<sup>49</sup> *Babcock v. Moore*, 62 Md. 161; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. Rep. 176; *Beach v. Mullin*, 34 N. J. Law, 343; *Tattersson v. Manufacturing Co.*, 106 Mass. 56; *Evans v. Railroad Co.*, 24 Mo. App. 114; *Prentiss v. Ledyard*, 28 Wis. 131; *Thomas v. Hatch*, 53 Wis. 296, 10 N. W. Rep. 393; *Haney v. Caldwell*, 35 Ark. 156. And see *Norton v. Cowell*, 65 Md. 359, 4 Atl. Rep. 408; *Bleeker v. Johnson*, 51 How. Pr. (N. Y.) 380; *Bascom v. Shillito*, 37 Ohio St. 431; *Collett v. Smith*, 143 Mass. 473, 10 N. E. Rep. 173; *post*, p. 746.

<sup>50</sup> *Keedy v. Long*, 71 Md. 385, 18 Atl. Rep. 704; *Adams Exp. Co. v. Trego*, 85 Md. 47; *Leatherberry v. Odell*, 7 Fed. Rep. 641; *Callo v. Brouncker*, 4 Car. & P. 518; *Beeston v. Caller*, 2 Car. & P. 007; *Newman v. Reagan*, 63 Ga. 755; *Drayton v. Reid*, 5 Daly (N. Y.) 442; *Fillieul v. Armstrong*, 7 Adol. & E. 557.

<sup>51</sup> *Post*, p. 727.

the contract, though it discharges him from further liability under it. Each must have done his part, in order that performance may be a discharge of the contract.

Whether or not a contract has been performed, so far as the person performing the contract is concerned, must be answered by reference to the operation of contract, while, in so far as the performance is concerned, it must be answered by reference to the construction of contract.

Where the promise is to do something as distinguished from a promise to pay money,—as, for instance, to manufacture or furnish goods, or to publish an advertisement,—it must be performed as required by the contract, to entitle the party to recover therefor.<sup>52</sup> At common law, a strict and literal performance was required, but by rules of equity, either adopted by statute or recognized by courts of law, a substantial compliance with the terms of the contract is sufficient; and if any damage is suffered from a failure to comply strictly with the contract, it may be recovered by action, or by way of set-off or counterclaim.<sup>53</sup>

<sup>52</sup> *Dauchey v. Drake*, 85 N. Y. 407. "Where a party has entered into a contract to perform work and furnish materials of a specified character, and the other party agrees to pay for the same upon the performance of the contract, although the work may be performed and materials furnished, yet, if not done in the manner stipulated, no action will lie for compensation." *Glaciux v. Black*, 50 N. Y. 145; *Smith v. Brady*, 17 N. Y. 173.

<sup>53</sup> *Phillip v. Gallant*, 62 N. Y. 256; *Woodward v. Fuller*, 80 N. Y. 312; *Heckman v. Pinkney*, 81 N. Y. 211; *Cutler v. Close*, 5 Car. & P. 337; *Hayward v. Leonard*, 7 Pick. (Mass.) 181; *Gleason v. Smith*, 9 Cush. (Mass.) 484; *Goldsmith v. Hand*, 26 Ohio St. 101; *Porter v. Woods*, 3 Humph. (Tenn.) 56; *Patterson v. Judd*, 27 Mo. 563; *Hovey v. Pitcher*, 13 Mo. 191; *Meincke v. Falk*, 61 Wis. 623, 21 N. W. Rep. 785. "If there has been no willful departure from the terms of the contract, or omission in essential parts, and the laborer has honestly and faithfully performed the contract in all its material and substantial features, he will not be held to have forfeited his right to remuneration by reason of mere technical, inadvertent, and unimportant omissions or defects. The law imposes no such liability, and exacts no such penalties." *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602. In some states the rule is established that "where one party has entered into a special contract to perform work for another, and furnish materials, and the work is done and the materials are furnished, but not in the manner stipulated in the contract, yet, if the work and materials are of any value and benefit to the other party, he is answerable to the amount whereby he is benefited."

Where no time for performance is fixed by the contract, a reasonable time is implied.<sup>54</sup> Where a time is specified, the question arises whether it is of the essence of the contract or not. This question must be answered by the rules of construction which we have already considered.<sup>55</sup> If time is of the essence, a performance after the time fixed does not bind the other party unless he waives the breach, and thereby, in effect, makes a new contract taking the place of the old one. Where a particular day is fixed upon for performance, or performance is required within a certain time, the contract may be performed at any time during the day or during the last day.<sup>56</sup>

If there is a failure of performance, partial or total, then the contract is broken. Whether the breach amounts to a discharge is a question which we shall hereafter discuss. For the present we shall deal only with discharge by performance.

#### SAME—PAYMENT.

**265. Payment consists in the performance of a contract—**

(a) By the delivery of money, or

(b) By the delivery of negotiable instruments conferring the right to receive money, in which latter case the payee may take the instrument—

(1) In discharge of his right absolutely, or

(2) Subject to a condition (which, in most jurisdictions, will be presumed, in the

*Norris v. School Dist.*, 12 Me. 293; *Hayward v. Leonard*, 7 Pick. (Mass.) 181. His liability in such a case does not arise out of the contract, but is quasi contractual. Post, p. 781.

<sup>54</sup> *Palmer v. Breen*, 34 Minn. 39, 24 N. W. Rep. 322; *Atwood v. Cobb*, 16 Pick. (Mass.) 227; *Pope v. Manuf'g Co.*, 107 N. Y. 61, 13 N. E. Rep. 592; *Minneapolis G. L. Co. v. Manuf'g Co.*, 122 U. S. 300, 7 Sup. Ct. Rep. 1187; *Roberts v. Beatty*, 2 Pen. & W. (Pa.) 63; *Phillips v. Morrison*, 3 Bibb (Ky.) 105. Where the act to be done is the payment of money, the presumption is that it is to be paid on demand. *Warren v. Wheeler*, 8 Metc. (Mass.) 97.

<sup>55</sup> Ante, p. 590.

<sup>56</sup> *Leake*, Cont. 441; *Startup v. Macdonald*, 6 Man. & G. 593.



absence of expressions to the contrary) that, if not paid when due, the payee reverts to his original rights, either to performance of the contract or satisfaction for its breach.

If the liability of a party to a contract consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges him by the performance of his original agreement. If, again, a person who is liable to perform certain acts under his contract wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with the other party to accept the proposed payment in lieu of such performance as he is entitled to under the contract.<sup>57</sup> In such a case the payment is a performance of the substituted agreement, and a discharge of the contract. Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action has accrued to the other, the obligation formed by this right of action may be discharged by an accord and satisfaction; that is, an agreement, the consideration for which is usually a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other.<sup>58</sup> Payment, then, is the performance of a contract, whether it be a performance of an original or of a substituted contract, or of a contract in which payment is the consideration for a forbearance to exercise a right of action which may have arisen from the breach of an agreement.

If counterfeit coins, bank notes, or other moneys are given in performance of a promise to pay money, even though they are believed to be good, there is no payment. The promisee may treat it as a nullity.<sup>59</sup> Where, for the purpose of making a payment, money

<sup>57</sup> Ante, p. 610.

<sup>58</sup> Post, p. 703.

<sup>59</sup> *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; *Young v. Adams*, 6 Mass. 182; *Gilman v. Peck*, 11 Vt. 516; *Blalock v. Phillips*, 38 Ga. 216; *Watson v. Cresap*, 1 B. Mon. (Ky.) 195; *U. S. v. Morgan*, 11 How. 154; *First Nat. Bank v. Buchanan*, 3 Pickle (Tenn.) 32, 9 S. W. Rep. 202. He may be estopped, however, if he was guilty of negligence in receiving the counterfeit, or if, after discovery of its character, he delays for an unreasonable time

is sent by the debtor to the creditor by mail, and is lost before it reaches him, it will discharge the debt, and the loss will fall on the creditor, if the remittance was in the manner expressly or impliedly authorized by him, but not otherwise.<sup>60</sup>

*Payment by Negotiable or Nonnegotiable Instrument.*

A negotiable or nonnegotiable instrument, such as a bill, note, check, or order, may be given for a sum due, either liquidated or unliquidated. It is in effect a substitution of a new agreement for the old one, but it does not necessarily discharge the old agreement. Where such a payment is made, either in performance of an existing contract or in satisfaction of a broken contract, it may discharge the party making it, either absolutely or conditionally. Whether it has the one or the other of these effects depends upon the intention of the parties.<sup>61</sup> If the instrument is accepted by the party entitled to payment, and in consideration thereof he promises, either expressly or impliedly, to discharge the other party altogether from his existing liabilities, the discharge of the original contract is absolute. The payee relies then upon the rights conferred by the instrument, and, if it is not paid, he must sue on it. He cannot sue on the original contract.<sup>62</sup> Even where a note or

to return it or notify the debtor. *Thomas v. Todd*, 6 Hill (N. Y.) 340; *Pindall v. Northwestern Bank*, 7 Leigh (Va.) 617; *Raymond v. Boar*, 13 Serg. & R. (Pa.) 318; *Rick v. Kelly*, 30 Pa. St. 527; *Wingate v. Neidlinger*, 50 Ind. 520; *Union Nat. Bank v. Baldenwick*, 45 Ill. 375; *Atwood v. Cornwall*, 28 Mich. 336. As to payment in forged or worthless bill or note, see post, p. 632, note 63.

<sup>60</sup> *Palmer v. Insurance Co.*, 84 N. Y. 63; *Gurney v. Howe*, 9 Gray (Mass.) 404; *Buell v. Chapin*, 99 Mass. 594; *McCluskey v. Association* (Sup.) 28 N. Y. Supp. 931; *Kenyon v. Association*, 122 N. Y. 247, 25 N. E. Rep. 299; *Burr v. Sickles*, 17 Ark. 428; *Williams v. Carpenter*, 36 Ala. 9; *Gross v. Criss*, 8 Grat. (Va.) 262.

<sup>61</sup> *Cheltenham S. & G. Co. v. Gates Iron Works*, 124 Ill. 623, 16 N. E. Rep. 923; *Flannigan v. Hambleton*, 54 Md. 222; *Combination Steel & Iron Co. v. St. Paul City Ry. Co.*, 47 Minn. 207, 49 N. W. Rep. 744; *Kirkpatrick v. Puryear* (Tenn.) 24 S. W. Rep. 1130; *National Bank v. Levy*, 17 R. I. 746, 24 Atl. Rep. 777; *Case Manuf'g Co. v. Saxman*, 138 U. S. 431, 11 Sup. Ct. Rep. 360; *Craddock v. Dwight*, 85 Mich. 587, 48 N. W. Rep. 644; *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. Rep. 558; note 64, *infra*.

<sup>62</sup> *Sard v. Rhodes*, 1 Mees. & W. 153; *Wolf v. Fink*, 1 Pa. St. 435; *Ralston v. Wood*, 15 Ill. 159; *Bausman v. Guarantee Co.*, 47 Minn. 377, 50 N. W. Rep.

other paper is accepted as an absolute payment, it does not amount to a discharge of the original contract if it is worthless because of the insolvency of the maker, or because it is a forgery, or for any other reason.<sup>43</sup> On the other hand, the instrument may be taken as a conditional discharge only; and in England and in most of our states it is presumed to have been so taken unless there is something to show a contrary intention.<sup>44</sup> In such a case the

490; *Kirkpatrick v. Puryear* (Tenn.) 24 S. W. Rep. 1130; *Susquehanna F. Co. v. White*, 66 Md. 444, 7 Atl. Rep. 802; *Haines v. Pearce*, 41 Md. 221; *Hoopes v. Strasburger*, 37 Md. 390; *Ralston v. Aultman & Co.* (Tex. Civ. App.) 26 S. W. Rep. 746; *Costar v. Davis*, 8 Ark. 213.

<sup>43</sup> *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; *Ontario Bank v. Lighthbody*, 13 Wend. (N. Y.) 101; *Roberts v. Fisher*, 43 N. Y. 159; *Walrath v. Abbott* (Sup.) 27 N. Y. Supp. 529; *Gilman v. Peck*, 11 Vt. 516; *Wainwright v. Webster*, Id. 576; *Hussey v. Sibley*, 66 Me. 192; *Hartshorn v. Hartshorn* (N. H.) 29 Atl. Rep. 406; *Harley v. Thornton*, 2 Hill (S. C.) 509a; *Edmunds v. Digges*, 1 Grat. (Va.) 359 (warranty of genuineness but not of value); *State v. Abramson*, 57 Ark. 142, 20 S. W. Rep. 1084 (contra where there is unreasonable delay in giving notice); *Sandy River Bank v. Miller*, 82 Me. 137, 19 Atl. Rep. 109; *Townsend v. Bank*, 7 Wis. 185; *Westfall v. Braley*, 10 Ohio St. 188; *Fleig v. Sleet*, 43 Ohio St. 53, 1 N. E. Rep. 24; ante, p. 630, note 59; post, p. 634, note 66; *Magee v. Carmack*, 13 Ill. 289. But see *Scruggs v. Gass*, 8 Yerg. (Tenn.) 175.

<sup>44</sup> *Sayer v. Wagstaff*, 5 Beav. 423; *Sard v. Rhodes*, 1 Mees. & W. 153; *Robinson v. Read*, 9 Barn. & C. 449; *Burdick v. Green*, 15 Johns. (N. Y.) 247; *Feldman v. Beler*, 78 N. Y. 203; *Peter v. Beverly*, 10 Pet. 532; *The Kimball*, 3 Wall. 37; *Bill v. Porter*, 9 Conn. 23; *Stewart Manufg Co. v. Rau* (Ga.) 17 S. E. Rep. 748; *Morriss v. Harveys*, 75 Va. 726; *Sayre v. King*, 17 W. Va. 562; *Mooring v. Insurance Co.*, 27 Ala. 254; *In re Parker*, 11 Fed. Rep. 397; *Shepherd v. Busch*, 154 Pa. St. 149, 26 Atl. Rep. 363; *Commercial Bank v. Bobo*, 9 Rich. Law (S. C.) 31; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. Rep. 316; *Akin v. Peters*, 45 Ark. 313; *Walsh v. Lennon*, 98 Ill. 27; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. Rep. 210; *Breitung v. Lindauer*, 37 Mich. 217; *Brown v. Dunkel*, 46 Mich. 29, 8 N. W. Rep. 537; *Case v. Seass*, 44 Mich. 195, 6 N. W. Rep. 227; *Aultman Taylor Co. v. Hetherington*, 42 Wis. 622; *First Nat. Bank v. Case*, 63 Wis. 504, 22 N. W. Rep. 833; *Leabo v. Goode*, 67 Mo. 120; *McGuire v. Bidwell*, 64 Tex. 43; *Baker v. Baker* (S. D.) 49 N. W. Rep. 1064; *Wadlington v. Covert*, 51 Miss. 631; *Brown v. Olmsted*, 50 Cal. 162; *Edwards v. Trulock*, 37 Iowa, 244; *Jaffrey v. Cornish*, 10 N. H. 505. This question often arises where a firm is dissolved, by the retirement of some of its members; and the remaining members, continuing the business either in the same name or in a different name, give a note in renewal of a note of the old firm, or for any other debt of the old firm. The giving of the note does

position of the parties is that the payee, having certain rights against the other party under a contract, has agreed to take the instrument from him instead of immediate payment of what is due him, or immediate enforcement of his right of action, and the other party, in giving the instrument, has thus far satisfied the payee's claim; but, if the instrument is not paid at maturity, the consideration for the payee's promise fails, and his original rights are restored to him. The effect of receiving a negotiable instrument conditionally is merely to suspend the right to sue on the original contract until the instrument matures, and when it matures, and is not paid, to give the right to sue either on it or on the original contract.<sup>64</sup> The agreement is defeasible upon condition sub-

not discharge the previous note or debt unless it is shown that such was the intention of the parties. *Hill v. Marcy*, 49 N. H. 268; *Jansen v. Grimshaw*, 125 Ill. 408, 17 N. E. Rep. 850; *Gates v. Hughes*, 44 Wis. 332; *Lutterloh v. McIlhenny Co.*, 74 Tex. 73, 11 S. W. Rep. 1063; *White v. Boone*, 71 Tex. 712, 12 S. W. Rep. 51; ante, p. 616, note 23. The fact that a receipt was given in full does not alone rebut the presumption that the instrument was received conditionally. *Tobey v. Barber*, 5 Johns. (N. Y.) 68; *Johnson v. Weed*, 9 Johns. (N. Y.) 310; *Cheltenham Stone & Gravel Co. v. Iron Works*, 124 Ill. 623, 16 N. E. Rep. 923; *Combination Iron Co. v. Railway Co.*, 47 Minn. 207, 49 N. W. Rep. 744. Contra, *Bailey v. Pardridge* (Ill. Sup.) 27 N. E. Rep. 89. In Massachusetts and several other states the presumption is that the instrument, at least if negotiable (*Edmond v. Caldwell*, 15 Me. 340; *Walt v. Brewster*, 31 Vt. 516), was intended to be accepted as an absolute discharge. *Dodge v. Emerson*, 131 Mass. 467; *Varner v. Nobleborough*, 2 Greenl. (Me.) 121; *Mehan v. Thompson*, 71 Me. 492; *Paine v. Dwinel*, 53 Me. 52; *Mason v. Douglas*, 6 Ind. App. 558, 33 N. E. Rep. 1009; *Smith v. Bettger*, 68 Ind. 254; *Teal v. Spangler*, 72 Ind. 380; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. Rep. 131; *Hutchins v. Olcott*, 4 Vt. 549; *Hadley v. Bordo*, 62 Vt. 285, 19 Atl. Rep. 476. Where a person gives his own note for a debt contracted at the time, there is no presumption that the creditor intended to take it as an absolute payment of the debt; but it is otherwise where the note of a third person is given without guaranty or indorsement, or with an indorsement "without recourse." *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409; *Booth v. Smith*, 3 Wend. (N. Y.) 66; *Noel v. Murray*, 13 N. Y. 167; *Deford v. Dryden*, 46 Md. 248. And see *Ford v. Mitchell*, 15 Wis. 304. But see *Devlin v. Chamblin*, 6 Minn. 468 (Gil 325); *McIntyre v. Kennedy*, 29 Pa. St. 448.

<sup>64</sup> *Sayer v. Wagstaff*, supra; *Happy v. Mosher*, 48 N. Y. 313; *Winstead Bank v. Webb*, 39 N. Y. 325; *Glenn v. Smith*, 2 Gill & J. (Md.) 493; *Hall v. Richardson*, 16 Md. 396; *Lupton v. Freeman*, 82 Mich. 638, 46 N. W. Rep. 1042; *Mor-*

sequent; that is, upon nonpayment of the instrument when due. If, after receiving the negotiable paper as a conditional payment, the creditor fails to give notice of its dishonor, or that it is a forgery, or fails to present it for payment, or is otherwise guilty of laches by which the value of the paper to the debtor is diminished or destroyed, it will be deemed a discharge of the debt.<sup>66</sup>

Payment, then, consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed, in the absence of expressions to the contrary, that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract, or rights to satisfaction for the breach of one.<sup>67</sup>

#### *Application of Payments.*

Where a person owes several debts to another, or owes on an account consisting of several different items, and makes a part payment, the question arises as to which debt is discharged. As a rule, in such cases the debtor has a right to say which debt he will pay, and he may show his intention in this respect by his conduct, or it may otherwise be inferred from the circumstances.<sup>68</sup> The creditor need not receive the payment, but, if he does receive

rison v. Smith, 81 Ill. 221; Miller v. Lumsden, 16 Ill. 161; Heartt v. Rhodes, 66 Ill. 351; Fry v. Patterson, 49 N. J. Law, 6, 12, 10 Atl. Rep. 390; Hays v. McClurg, 4 Watts (Pa.) 452; Barnet v. Smith, 30 N. H. 256. See, also, the cases cited in note 64, supra.

<sup>66</sup> Peacock v. Pursell, 14 C. B. (N. S.) 728; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. Rep. 763; Dayton v. Trull, 23 Wend. (N. Y.) 346; Stevens v. Park, 73 Ill. 387; State v. Abramson, 57 Ark. 142, 20 S. W. Rep. 1084; Phoenix Ins. Co. v. Allen, 11 Mich. 501; Cochran v. Wheeler, 7 N. H. 202.

<sup>67</sup> Robinson v. Read, 9 Barn. & C. 449; Sayer v. Wagstaff, 5 Beav. 415; Anson, Cont. 273.

<sup>68</sup> Stone v. Seymour, 15 Wend. (N. Y.) 19; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403; Tayloe v. Sandiford, 7 Wheat. 13; Fowke v. Bowle, 4 Har. & J. (Md.) 566; Hanson v. Rounsavell, 74 Ill. 238; Stewart v. Keith, 12 Pa. St. 238; Sawyer v. Tappan, 14 N. H. 352.

it, he is bound to apply it as expressly or impliedly directed by the debtor.<sup>69</sup>

If the debtor does not expressly or impliedly direct the application of the payment, at the time of the payment,<sup>70</sup> the creditor, as a rule, may apply it as he may see fit.<sup>71</sup> He may apply it, for in-

<sup>69</sup> *Stone v. Seymour*, 15 Wend. (N. Y.) 20; *Patty v. Milne*, 16 Wend. (N. Y.) 557, 22 Wend. (N. Y.) 558; *Ellis v. Mason*, 32 S. C. 277, 10 S. E. Rep. 1069; *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 16 Atl. Rep. 799; *Atkinson v. Cox*, 54 Ark. 444, 16 S. W. Rep. 124; *Stewart v. Hopkins*, 30 Ohio St. 502; *Wetherell v. Jay*, 40 Me. 325; *Champenois v. Fort*, 45 Miss. 355; *Runyan v. Latham*, 5 Ired. (N. C.) 551. After acquiescing, however, in the application of a payment in extinguishing one demand, and accepting the benefit of it for that purpose, a debtor cannot avail himself of the same payment to extinguish another demand, although, when he made the payment, he directed its application on the latter. *Flarsheim v. Brestup*, 43 Minn. 298, 45 N. W. Rep. 438.

<sup>70</sup> A debtor cannot, after having made a payment, direct its application to any special debt, since after payment he loses all control over it. *Pearce v. Walker* (Ala.) 15 South. Rep. 568.

<sup>71</sup> *Mayor, etc., of Alexandria v. Patten*, 4 Cranch, 317; *Brady v. Hill*, 1 Mo. 315; *Harding v. Tift*, 75 N. Y. 461; *Webb v. Dickinson*, 11 Wend. (N. Y.) 62; *Van Rensselaer v. Roberts*, 5 Denio (N. Y.) 470; *National Bank v. Bigler*, 83 N. Y. 51; *First Nat. Bank v. Johnson* (Vt.) 26 Atl. Rep. 634; *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. Rep. 115; *Whitaker v. Groover*, 54 Ga. 174; *McLendon v. Frost*, 57 Ga. 448; *Jones v. Williams*, 39 Wis. 300; *Case v. Fant*, 3 C. C. A. 418, 53 Fed. Rep. 41; *Henry Bill Pub. Co. v. Utley*, 155 Mass. 366, 29 N. E. Rep. 635; *Lee v. Early*, 44 Md. 80; *Senter v. Williams* (Ark.) 17 S. W. Rep. 1029; *Beck v. Haas*, 111 Mo. 264, 20 S. W. Rep. 19; *Howard v. McCall*, 21 Grat. (Va.) 205; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. Rep. 391; *Jefferson v. Church*, 41 Minn. 392, 43 N. W. Rep. 74; *Byrnes v. Claffey*, 69 Cal. 120, 10 Pac. Rep. 321; *U. S. v. Wardwell*, 5 Mason, 82, Fed. Cas. No. 16,640. Where, for instance, personalty and realty are sold at the same time, to the same person, but a separate price is agreed upon for each, and the vendee afterwards pays generally more than the price of the personalty, the vendor may apply the payment first to the price of the personalty, and enforce a vendor's lien for the balance due on the realty. *Koch v. Ruth* (Ill. Sup.) 37 N. E. Rep. 317. There are some limitations to this rule. The creditor, for instance, cannot, without the debtor's consent, apply the payment to an illegal or invalid claim, such as a debt for liquor sold in violation of law, or a claim for usurious interest, or a note made without consideration to hinder and defraud creditors. *Phillips v. Moses*, 65 Me. 70; *Pickett v. Bank*, 32 Ark. 346; *McCausland v. Ralston*, 12 Nev. 195; *Caldwell v. Wentworth*, 14 N. H. 431; *Bancroft v. Dumas*, 21 Vt. 456; *Parch-*

stance, to a debt which is barred by the statute of limitations, in preference to another which is not barred." Having once made the application, he cannot change it without the debtor's consent."

If neither party makes an appropriation of the payment, the law will apply it. But upon what principle is the adjustment to be made? In determining this question the courts have met with difficulties, and there is a direct conflict in the cases. According to the civil law, the presumable intention of the debtor was resorted to as the rule to determine the application, and, in the absence of any express declaration by either party, the payment was applied in the way that would be most beneficial to the debtor. "The payment was consequently applied to the most burdensome debt,—to one that carried interest, rather than to that which carried none; to one secured by a penalty, rather than to that which rested on a simple stipulation; and, if the debts were equal, then to that which had been first contracted."<sup>74</sup> This rule has been adopted in a number of cases both in England and in this country. In a well-considered New York case the rule was approved after a

man v. McKinney, 12 Smedes & M. (Miss.) 631; Rohan v. Hanson, 11 Cush. (Mass.) 44; Kidder v. Norris, 18 N. H. 532; though it is otherwise if the debtor consents, Brown v. Burns, 67 Me. 535; Feldman v. Gamble, 26 N. J. Eq. 494. But he may apply it to a debt which is merely unenforceable, and not illegal. Haynes v. Nice, 100 Mass. 327; Ayer v. Hawkins, 19 Vt. 26; Murphy v. Webber, 61 Me. 478; note 72, *infra*. He cannot apply it to a debt not yet due. Heard v. Pulaski, 80 Ala. 508, 2 South. Rep. 343; Robe v. Stickney, 36 Ala. 482. The application must be made within a reasonable time, or the right to make it will be lost, and it will then be applied by law as in the absence of direction by either party. Harker v. Conrad, 12 Serg. & R. (Pa.) 301.

<sup>72</sup> Jackson v. Burke, 1 Dill. 311, Fed. Cas. No. 7,133; Ayer v. Hawkins, 19 Vt. 26; Williams v. Griffith, 5 Mees. & W. 300; Waugh v. Cope, 6 Mees. & W. 824; Murphy v. Webber, 61 Me. 478; Pond v. Williams, 1 Gray (Mass.) 630; Ramsay v. Warner, 97 Mass. 8; Beck v. Haas, 31 Mo. App. 180. But see *Id.* (Mo. Sup.) 20 S. W. Rep. 19.

<sup>73</sup> Offutt v. King, 1 McArthur (D. C.) 312; Pearce v. Walker (Ala.) 15 South. Rep. 568; Cremer v. Higginson, 1 Mason 337, Fed. Cas. No. 3,383; McMaster v. Merrick, 41 Mich. 505, 2 N. W. Rep. 895. Nor can the creditor be compelled to change the application. Jefferson v. Church of St. Matthew, 41 Minn. 392, 48 N. W. Rep. 74; Seymour v. Marvin, 11 Barb. (N. Y.) 80.

<sup>74</sup> Devaynes v. Noble (Clayton's Case), 1 Mer. 572, 006.

full review of the authorities, and a payment was applied to a mortgage and a judgment debt in preference to an account, because the former would bear most heavily on the debtor.<sup>75</sup> Many of the courts, on the other hand, have adopted a rule to some extent directly opposed to the civil-law rule. "If the application is made by neither party," it has been said by the supreme court of the United States, "it becomes the duty of the court, and in its exercise a sound discretion is to be exercised. It cannot be conceded that this application is to be made in a manner most advantageous to the debtor. If neither party avails himself of his power, and it devolves on the court, it would seem reasonable that an equitable application should be made; and, it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." In this case the payment was applied to other demands rather than to a judgment debt, on the ground that the former were not so well secured.<sup>76</sup> Probably most of the courts in this country follow the rule just stated, though with some qualification. It is very generally said that an equitable application will be made; that is, that the payment will be applied according to the justice of the particular case, in view of all the circumstances.<sup>77</sup> Such a rule is not very definite. What is to be deemed equitable? Is it more equitable

<sup>75</sup> *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Bacon v. Brown*, 1 Bibb (Ky.) 334; *Jones v. Benedict*, 83 N. Y. 79; *Heyward v. Lomax*, 1 Vern. 24; *Prowse v. Worthinge*, 2 Brown & G. 107; *Neal v. Allison*, 50 Miss. 175; *Gwinn v. Whitaker*, 1 Har. & J. (Md.) 754; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. Rep. 391; *Robinson v. Doolittle*, 12 Vt. 246; *Moore v. Kiff*, 78 Pa. St. 96.

<sup>76</sup> *Field v. Holland*, 6 Cranch, 27. And see *Burks v. Albert*, 4 J. J. Marsh. (Ky.) 97; *Gardner v. Leck* (Minn.) 54 N. W. Rep. 746; *Leeds v. Gifford*, 41 N. J. Eq. 464, 5 Atl. Rep. 795; *The D. B. Steelman*, 48 Fed. Rep. 580; *Stamford Bank v. Benedict*, 15 Conn. 437; *Hilton v. Burley*, 2 N. H. 193. In a later case, under the same rule (that is, the rule of equitable application), the payments were so applied as to operate beneficially to the sureties of the debtor, and against the creditor. *U. S. v. Kirkpatrick*, 9 Wheat. 737.

<sup>77</sup> *Smith v. Loyd*, 11 Leigh (Va.) 512; *Stone v. Seymour*, 15 Wend. (N. Y.) 19; *White v. Trumbull*, 15 N. J. Law, 314; *Allen v. Culver*, 3 Denio (N. Y.) 284; *Pearce v. Knight*, 31 Vt. 701; *Crompton v. Pratt*, 105 Mass. 255; *Hersey v. Bennett*, 28 Minn. 86, 9 N. W. Rep. 590.



to give effect to the civil-law rule, and apply the payment as would be most beneficial to the debtor, or to follow the opposite rule, and consider the creditor's interests? The Minnesota court, in stating the rule, has thus qualified it: "It is true that, where the parties have not made any specific application of payments, courts will make it according to the justice and equity of the case; but in doing so they are governed by certain general and established rules, and are not at liberty to adopt their own notions of what may be just and equitable in each particular case."<sup>78</sup> One of these rules is that, where there is but one continuous account of several items, "the payments will be applied on the account according to the priority of time,—that is, the first item on the debit side is discharged or reduced by the first item on the credit side;" and so, where there are several debts of equal dignity, a payment will generally be applied to the oldest.<sup>79</sup> As we have seen, when we get beyond this, there is a conflict of opinion.

It is impossible, therefore, to lay down any general rules. The different courts, though they may differ as to the rule by which they are to be governed, reach the same result on certain points; and it may, no doubt, be said that by the weight of authority, whether under the one rule or the other, payments will be applied (1) in satisfaction of an unsecured, in preference to a secured, debt, or of the debt whose security is most precarious, if it does not conflict with the rules hereafter mentioned;<sup>80</sup> (2) to a debt secured by mortgage or judgment, rather than to a simple account or debt;<sup>81</sup>

<sup>78</sup> *Hersey v. Bennett*, 28 Minn. 86, 9 N. W. Rep. 590. And see *Miller v. Miller*, 23 Me. 22; *Bobe v. Stickney*, 36 Ala. 482.

<sup>79</sup> *Devaynes v. Noble* (Clayton's Case), 1 Mer. 572; *Hersey v. Bennett*, *supra*; *Miller v. Miller*, *supra*; *Parks v. Ingram*, 22 N. H. 283; *Pearce v. Knight*, 31 Vt. 701; *Crompton v. Pratt*, 105 Mass. 255; *Smith v. Loyd*, 11 Leigh (Va.) 512; *Hill v. Robbins*, 22 Mich. 474; *Winnebago Mills v. Travis* (Minn.) 58 N. W. Rep. 36; *Cushing v. Wyman*, 44 Me. 121; *Fairchild v. Holly*, 10 Conn. 175; *Truscott v. King*, 6 N. Y. 147; *Jones v. U. S.*, 7 How. 681; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Emery v. Tichout*, 13 Vt. 15; *Frazer v. Miller*, 7 Wash. 521, 35 Pac. Rep. 427; *Stienbergen v. Gowdy* (Ky.) 19 S. W. Rep. 186; *Sprague v. Hazenwinkle*, 53 Ill. 419.

<sup>80</sup> Note 70, *supra*.

<sup>81</sup> Note 75, *supra*.

(3) in extinguishment of a certain, rather than a contingent, liability;<sup>82</sup> (4) to extinguish or reduce debts prior in time;<sup>83</sup> (5) to extinguish an existing debt, rather than a debt not yet due.<sup>84</sup>

### SAME—TENDER.

**266.** Tender is an offer or attempt to perform, and may be either—

- (a) An offer to do something promised, in which case the offer, and its refusal by the promisee, discharge the promisor from the contract.
- (b) An offer to pay something promised, in which case the offer, and its refusal by the promisee, do not discharge the debt, but prevent the promisee from recovering more than the amount tendered, and in an action by the promisee entitle the promisor to recover the costs of his defense.

“Tender” is an attempted performance. The word is applied to performance of two kinds: (1) To performance of a promise to do something; and (2) to performance of a promise to pay something,—and the effect of the attempt at performance in the two cases is different. In both cases the performance is frustrated by the act of the party for whom it is to take place.

Where, in a contract for the sale of goods, the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.<sup>85</sup> Where,

<sup>82</sup> *Niagara Bank v. Roosevelt*, 9 Cow. (N. Y.) 409; *Bank of Portland v. Brown*, 22 Me. 295.

<sup>83</sup> Note 79, *supra*.

<sup>84</sup> *Baker v. Stackpole*, 9 Cow. (N. Y.) 420; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. Rep. 474; *Heard v. Pulaski*, 80 Ala. 502, 2 South. Rep. 343; *Bohe v. Stickney*, 36 Ala. 482.

<sup>85</sup> *Startup v. Macdonald*, 6 Man. & G. 593; *Benj. Sales*, 563; *Lamb v. Lathrop*, 13 Wend. (N. Y.) 95; *Phelps v. Hubbard*, 51 Vt. 489; *Oelrichs v. Artz*, 21 Md. 524; *Berry v. Nall*, 54 Ala. 446; *Mitchell v. Merrill*, 2 Blackf.

however, the performance due consists in the payment of a sum of money, a tender by the debtor, although it may constitute a good defense to an action by the creditor, does not discharge the debt.<sup>86</sup> If the creditor will not take the money when it is due and is tendered him, he puts himself at a disadvantage if he should attempt to recover it by action, but the debt is not discharged. The debtor, to successfully defend by pleading the tender, must continue always ready and willing to pay the debt, or, as it is sometimes said, the tender must be kept good; and when he is sued, and pleads the tender, he must, in most jurisdictions, pay the money into court.<sup>87</sup> If the plea is sustained, the creditor gets nothing but what was originally tendered him, and the debtor gets judgment for his costs so that he is placed, as nearly as can be, in as good a position as he held at the time of the tender.<sup>88</sup>

Tender, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment.<sup>89</sup> Further than this, the tender must be an offer of money produced, or at least made accessible to the creditor, and not of a check, for instance. The debtor must have it with him, and produce it if required; but its actual produc-

(Ind.) 87. There must be an actual offer to deliver. A mere readiness and willingness is not sufficient. *Cranley v. Hillary*, 2 Maule & S. 120; *Williams v. Bentley*, 27 Pa. St. 294; *Eastman v. Rapids*, 21 Iowa, 590; *Cramp v. Simon*, 34 Ala. 126; *Steele v. Biggs*, 22 Ill. 643; *Sheredine v. Gaul*, 2 Dall. 190.

<sup>86</sup> *Dixon v. Clarke*, 5 C. B. 376.

<sup>87</sup> *Dixon v. Clarke*, 5 C. B. 376; *Aulger v. Clay*, 109 Ill. 487; *State v. Railroad Co.*, 33 Fed. Rep. 730; *Rice v. Kahn*, 70 Wis. 323, 35 N. W. Rep. 405; *Becker v. Boon*, 61 N. Y. 317; *Werner v. Tuch*, 127 N. Y. 217, 27 N. E. Rep. 845; *Columbian Bldg. Ass'n v. Crump*, 42 Md. 192; *Woolner v. Levy*, 48 Mo. App. 469; *McDaniel v. Upton*, 45 Ill. App. 151; *Bissell v. Heyward*, 96 U. S. 580; *Roberts v. White*, 146 Mass. 256, 15 N. E. Rep. 568; *Pulsifer v. Shepard*, 36 Ill. 513; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. Rep. 202; *Eddy v. O'Hara*, 14 Wend. (N. Y.) 221.

<sup>88</sup> *Cornell v. Green*, 10 Serg. & R. (Pa.) 14. See cases in notes 86, 87, *supra*, and the following notes.

<sup>89</sup> *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. Rep. 158; *Abshire v. Corey*, 113 Ind. 484, 15 N. E. Rep. 685; *People's Bank v. Borough of Norwalk*, 56 Conn. 547, 16 Atl. Rep. 257; *Tellou v. Britton*, 9 N. J. Law, 120; *Hubbard v. Bank*, 8 Cow. (N. Y.) 88.

tion may be waived by the creditor, not only expressly, but impliedly, as where, before it is produced, he declares that he will not receive it.<sup>90</sup> It need not necessarily be of the exact sum, provided, however, it is not less than is due, but it must be of such a sum that the creditor can take exactly what is due without being called upon to give change.<sup>91</sup> Further than this, the tender must be made by the person whose duty it is to pay, or by his agent, and not by a mere stranger or intermeddler;<sup>92</sup> and it must be made to the party entitled to receive payment, or to his duly-authorized agent;<sup>93</sup> and it must be understood as a tender, and be absolute

<sup>90</sup> *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Hall v. Insurance Co.*, 57 Conn. 105, 17 Atl. Rep. 356; *Parker v. Pettit*, 43 N. J. Law, 512; *Collier v. White*, 67 Miss. 123, 6 South. Rep. 618; *Mathis v. Thomas*, 101 Ind. 119; *Knight v. Abbott*, 30 Vt. 577; *Bowen v. Holly*, 38 Vt. 574; *Murphy v. Telegraph Co. (City Ct. N. Y.)* 3 N. Y. Supp. 804; *Pinney v. Jorgenson*, 27 Minn. 26, 6 N. W. Rep. 376; *Larsen v. Breene*, 12 Colo. 480, 21 Pac. Rep. 498; *Guthman v. Keam*, 8 Neb. 502, 1 N. W. Rep. 129; *Behaly v. Hatch*, 1 Miss. 369; *Oakland Bank v. Applegarth*, 67 Cal. 86, 7 Pac. Rep. 139, 476; *Dungan v. Benefit Ins. Co.*, 46 Md. 469; *Hartsock v. Mort*, 76 Md. 281, 25 Atl. Rep. 303. A tender by check is sufficient where the parties have been in the habit of so paying and receiving payment, and where no objection to the tender is made on this ground. *McGrath v. Gegner*, 77 Md. 331, 26 Atl. Rep. 502. And see *Walsh v. Association*, 101 Mo. 534, 14 S. W. Rep. 722. Where no objection is made to a tender of a certificate of deposit upon the ground that it is not legal tender, or that it is for too large an amount, and the creditor cannot make change, such objections are waived. *Gradle v. Warner* (Ill. Sup.) 29 N. E. Rep. 1118.

<sup>91</sup> *Betterbee v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336; *Fridge v. State*, 3 Gill & J. (Md.) 103; *Weld v. Bank*, 158 Mass. 339, 33 N. E. Rep. 519; *Brandt v. Railroad Co.*, 26 Iowa, 114; *Hilphrey v. Railroad Co.*, 29 Iowa, 480; *Patnote v. Sanders*, 41 Vt. 66; *Patterson v. Cox*, 25 Ind. 261.

<sup>92</sup> *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. Rep. 672; *Kincaid v. School Dist.*, 11 Me. 188; *Brown v. Dysinger*, 1 Rawle (Pa.) 408; *Mahler v. Newbauer*, 32 Cal. 168; *McDougal v. Dougherty*, 11 Ga. 570; *Johnson v. Smock*, 1 N. J. Law, 106.

<sup>93</sup> *Carman v. Pultz*, 21 N. Y. 547; *Jackson v. Crafts*, 18 Johns. (N. Y.) 110; *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. Rep. 688; *Oatman v. Walker*, 33 Me. 67; *King v. Finch*, 60 Ind. 420; *McIniffe v. Wheelock*, 1 Gray (Mass.) 600; *Conrad v. Trustees of Grand Grove*, 64 Wis. 258, 25 N. W. Rep. 24; *Billiot v. Robinson*, 13 La. Ann. 529; *Hoyt v. Byrnes*, 11 Me. 475; *Cropp v. Hambleton*, Cro. Eliz. 48. Where two persons have entered into a joint contract

and unconditional.\*4 It has also been held that the tender must be made at a reasonably fit time and place. Where, for instance, a tender, partly in bank notes, was abruptly made upon the street to a person who was known to be sick and nearly blind, and who de-

for the purchase of lands, a tender of a deed to one of them, who refuses to accept it, is sufficient, without tendering it also to the other. *Carman v. Pultz*, supra; *Oatman v. Walker*, supra; *Dawson v. Ewing*, 16 Serg. & R. (Pa.) 371. And see, as to tender to one of several joint mortgagees, *Flanigan v. Seelye* (Minn.) 55 N. W. Rep. 115.

\*4 *Hunter v. Warner*, 1 Wis. 141; *Potts v. Plaisted*, 30 Mich. 149; *Tompkins v. Batie*, 11 Neb. 147, 7 N. W. Rep. 747; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. Rep. 158; *Pulsifer v. Shepard*, 36 Ill. 513; *Odum v. Railroad Co.*, 94 Ala. 488, 10 South. Rep. 222; *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 342; *Appeals of Forest Oil Co.*, 118 Pa. St. 138, 12 Atl. Rep. 442; *Rives v. Dudley*, 3 Jones, Eq. (N. C.) 126; *Henderson v. Cass Co.*, 107 Mo. 50, 18 S. W. Rep. 992; *Cothran v. Scanlan*, 34 Ga. 555; *Rose v. Duncan*, 49 Ind. 269. Where the amount of a debt, for instance, is disputed, an offer of a less sum than the creditor claims to be due, if coupled with a condition, express or implied from manner and conduct, that it shall be accepted in discharge of the debt, is a mere offer to compromise, and not a valid tender, though no more than is offered may in fact be due. *Thomas v. Evans*, 10 East, 101; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47; *Thayer v. Brackett*, 12 Mass. 450; *Richardson v. Laboratory*, 9 Metc. (Mass.) 42; *Chapin v. Chapin* (Mass.) 36 N. E. Rep. 746; *Elderkin v. Fellows*, 60 Wis. 339, 19 N. W. Rep. 101; *Draper v. Hitt*, 43 Vt. 439; *Moore v. Norman*, 52 Minn. 83, 53 N. W. Rep. 809; *Doty v. Crawford*, 39 S. C. 1, 17 S. E. Rep. 377; *Latham v. Hartford*, 27 Kan. 249; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. Rep. 202. Though a conditional tender is not good, a tender under protest, reserving the right to dispute the amount due, is a good tender, if it does not impose any conditions on the creditor. *Greenwood v. Sutcliffe* [1892] 1 Ch. 1. A debtor, in tendering payment of a negotiable instrument, has a right to demand the surrender of the instrument; though it is probably otherwise where the instrument is not negotiable. Even in the latter case, however, it has been held that such a condition does not render the tender invalid. See *Storey v. Krewson*, 55 Ind. 397; *Cahoon v. Bank*, 7 N. Y. 486; *Barley v. Buchanan Co.*, 115 N. Y. 297, 22 N. E. Rep. 155; *Strafford v. Welch*, 59 N. H. 46. So, also, the tender of the amount due on a mortgage is not rendered invalid by the fact that it is accompanied by a condition that the mortgage be satisfied, since the condition is one which the mortgagee, on being paid, is bound to perform. *Halpin v. Insurance Co.*, 118 N. Y. 105, 23 N. E. Rep. 482. And a tender to a pledgee by the assignee of the pledge of the amount secured is not vitiated by a condition that the pledge be delivered to him. *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 309, and 15 Pac. Rep. 773.

clined to transact the business until the next morning, it was held invalid.<sup>95</sup>

As in the case of a tender of payment, so, also, where goods are tendered in compliance with a contract of sale, the tender must comply with all the terms of the contract. An offer, for instance, to deliver a greater or a less quantity than the contract calls for, is not a valid tender.<sup>96</sup> It is also necessary that the buyer shall be given an opportunity to examine them if he chooses, so that he may satisfy himself that they comply with the terms of the contract; otherwise, he does not break the contract by refusing to accept them.<sup>97</sup>

#### DISCHARGE OF CONTRACT BY BREACH—IN GENERAL.

**267.** Breach of contract is where a party thereto breaks through the obligation which it imposes.

**268.** The effect of a breach of contract is that—

- (a) It always gives the party injured a right of action.
- (b) It often, but not always, discharges the contract. This depends upon circumstances to be presently discussed.

If one of the parties to a contract breaks through the obligation which it imposes, a new obligation arises in every case,—a right of action conferred upon the party injured by the breach. Besides this, there are circumstances under which the breach will discharge the injured party from such performance as may still be due from him. Every breach of contract confers the right of action upon the injured party, but every breach does not necessarily discharge him from doing what he has undertaken to do under the contract. The

<sup>95</sup> *Waldron v. Murphy*, 40 Mich. 668.

<sup>96</sup> *Dixon v. Fletcher*, 3 Mees. & W. 146; *Hart v. Mills*, 15 Mees. & W. 85; *Curliffe v. Harrison*, 6 Exch. 908; *Perry v. Iron Co.*, 16 R. I. 318, 15 Atl. Rep. 87; *Rommel v. Wingate*, 103 Mass. 327; *Croninger v. Crocker*, 62 N. Y. 151.

<sup>97</sup> *Isherwood v. Whitmore*, 10 Mees. & W. 757 (in this case goods were tendered in closed casks, so that there was no opportunity to examine them); *Wyman v. Winslow*, 11 Me. 398; *Bates v. Bates*, 1 Miss. 401.

contract may be broken wholly or in part, and, if in part, the breach may or may not be sufficiently important to operate as a discharge; or, if it is of such importance, the injured party may choose not to regard it as a discharge, preferring to continue to carry out the contract, reserving to himself the right to sue for such damages as he may have sustained by the breach. It is often very difficult to determine whether or not a breach of one of the terms of a contract discharges the party injured. These questions will be discussed in the following pages.

### FORMS OF DISCHARGE BY BREACH.

269. A contract may be broken in any one of three ways:

- (a) A party may renounce his liabilities under it—
  - (1) Before performance is due.
  - (2) In the course of performance.
- (b) He may by his own act make it impossible for him to fulfill his liabilities under it—
  - (1) Before performance is due.
  - (2) In the course of performance.
- (c) He may totally or partially fail to perform what he has promised.

Of these three forms of breach, it will be noticed that the first two—breach by renunciation and breach by acts rendering performance impossible—may take place while the contract is still wholly executory; that is, before either party is entitled to demand a performance by the other of his promise. The last—breach by failure to perform—can only take place at or during the time for performance. We will take up each of these forms of breach in turn, and endeavor to make it plain when they amount to a discharge.

### SAME—RENUNCIATION OF CONTRACT.

270. Renunciation of a contract by one of the parties before the time for performance discharges the other party if he so chooses, but not otherwise, and entitles him to sue

at once for the breach.<sup>98</sup> In order that such a renunciation may amount to a discharge,

- (a) It must go to so much of the performance that an actual breach thereof at the time of performance would operate as a discharge.
- (b) The other party must treat it as a discharge.
- (c) It makes no difference that the contract is contingent.

271. Renunciation of a contract by one of the parties in the course of performance discharges the other party from a continued performance of his promise, and entitles him to sue at once for the breach.

*Before Performance is Due.*

The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time for performance arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due. It is therefore settled, by the great weight of authority, that the renunciation<sup>99</sup> of a contract by one of the parties before the time for performance has come does not discharge the other unless the latter chooses to regard it as a discharge.<sup>100</sup> If he chooses, he may so regard it, and at once sue for the breach.<sup>101</sup> The discharge is optional with

<sup>98</sup> This rule is not recognized in Massachusetts.

<sup>99</sup> There must be a positive and unqualified renunciation, and not a mere expression of intention not to perform. *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. Rep. 850; *Smoot's Case*, 15 Wall. 36.

<sup>100</sup> *Frost v. Knight*, L. R. 7 Exch. 111; *Avery v. Bowden*, 5 El. & Bl. 714; *Howard v. Daly*, 61 N. Y. 362; *Nilson v. Morse*, 52 Wis. 240, 9 N. W. Rep. 1; *Kadish v. Young*, 108 Ill. 170; *Zuck v. McClure*, 98 Pa. St. 541. It is settled, however, in this country at least, that, where a person renounces his contract for work to be done for him at a certain price, the other party cannot go on and do the work, and then sue for the full price. He has no right to proceed with the work after such countermand, but must stop, and sue for damages. *Clark v. Marsiglia*, 1 Denio (N. Y.) 317; *Lord v. Thomas*, 64 N. Y. 107; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. Rep. 756; *Collyer v. Moulton*, 9 R. I. 90; *Heaver v. Lannahan*, 74 Md. 493, 22 Atl. Rep. 263.

<sup>101</sup> *Hochster v. De la Tour*, 2 El. & Bl. 678; *Frost v. Knight*, L. R. 7 Exch.



him. In a leading case on this point the defendant had engaged the plaintiff to enter into his service, the employment to commence at a future day, but, before that time arrived, he wrote the plaintiff that he should not require his services. The plaintiff at once sued for the breach of contract, though the time for performance had not arrived, and the court held that he was entitled to do so. It was said by the court that, "where there is a contract to do an act on a future day, there is a relation constituted between the parties, in the meantime, by the contract, and that they impliedly promise that, in the meantime, neither will do anything to the prejudice of the other inconsistent with that relation."<sup>102</sup> And in another case the defendant had agreed to marry the plaintiff upon his father's death, but renounced the contract, and the plaintiff was allowed to sue for the breach during the father's lifetime. "The promisee," it was said, "has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests."<sup>103</sup>

111; *Roper v. Johnson*, L. R. 8 C. P. 167; *Howard v. Daly*, 61 N. Y. 362; *Burtis v. Thompson*, 42 N. Y. 246; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. Rep. 773; *Fox v. Kitton*, 19 Ill. 519; *Grau v. McVicker*, 8 Biss. 13, Fed. Cas. No. 5,708; *Show v. Insurance Co.*, 69 N. Y. 286; *Crabtree v. Messersmith*, 19 Iowa, 179; *Hosmer v. Wilson*, 7 Mich. 204; *Dingley v. Oler*, 11 Fed. Rep. 372; *Id.*, 117 U. S. 490, 6 Sup. Ct. Rep. 850. Contra, *Daniels v. Newton*, 114 Mass. 530. So, also, in case of contracts to manufacture, sell, and deliver goods at a future time, if, before the time arrives, the purchaser repudiates the contract, and declares that he will not take the goods, the seller need not tender them, but may treat the contract as broken, and sue at once for the breach. *Roper v. Johnson*, *supra*; *Eckenrode v. Chemical Co.*, 55 Md. 51; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. Rep. 436; *Bunge v. Koop*, 48 N. Y. 225; *Dillon v. Anderson*, 43 N. Y. 231; *James v. Adams*, 16 W. Va. 245; *McCormick v. Basal*, 46 Iowa, 235; *Zuck v. McClure*, 98 Pa. St. 541; *Kadish v. Young*, 108 Ill. 170; *Platt v. Brand*, 26 Mich. 173.

<sup>102</sup> *Hochster v. De la Tour*, *supra*; *Howard v. Daly*, *supra*; *Nilson v. Morse*, 52 Wis. 240, 9 N. W. Rep. 1; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Aetna Life Ins. Co. v. Nexsen*, 84 Ind. 347.

<sup>103</sup> *Frost v. Knight*, *supra*; *Burtis v. Thompson*, *supra*; *Holloway v. Griffith*, 32 Iowa, 409.

The case just mentioned is authority for the statement in the black-letter text that the operation of the rule is not affected by the fact that the performance is contingent, for in this case the father may have outlived the plaintiff or the defendant, in which case the time for performance never could arrive.

The rule laid down above is subject to these two limitations:

(1) The first is that the renunciation must deal with so much of the performance to which the contract binds the promisor that an actual breach thereof at the time of performance would operate as a discharge. This point was mentioned in a case in which a tenant claimed damages of his landlord for breach of contract by repudiation of a covenant to rebuild the premises at a period of the tenancy which had not yet arrived. "The contract," it was said, "was the whole lease. The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate to say—though it is not necessary in this case to decide the point—that an anticipatory breach would not entitle him to do so, and that it does not appear to me that he could elect to rescind part of the contract."<sup>104</sup>

(2) The second limitation of the rule is that the promisee must treat the renunciation by the promisor as a discharge. If he does not so treat the renunciation, but continues to insist on the performance of the promise, the contract remains in existence for the benefit, and at the risk, of both parties.<sup>105</sup> If anything occur, for instance, to discharge it from other causes, the promisor may take advantage of such discharge. A vessel owner agreed with a person, by charter party, that his ship should go to Odessa, and there take on a cargo from such person's agent. The vessel reached Odessa, and her master demanded a cargo, but the agent refused to supply one. The master, instead of treating this refusal as a breach of contract, and sailing away, in which event the vessel

<sup>104</sup> *Johnstone v. Milling*, 16 Q. B. Div. 460. And see *Obermyer v. Nichols*, 6 Bin. (Pa.) 159.

<sup>105</sup> *Avery v. Bowden*, 5 El. & Bl. 714; *Frost v. Knight*, L. R. 7 Exch. 111; *Kadish v. Young*, 108 Ill. 170; *Howard v. Daly*, 61 N. Y. 362.

owner could have sued at once for breach of contract, continued to demand a cargo, and, before the running days were out,—before, therefore, a breach by nonperformance had occurred,—a war broke out between England and Russia, rendering the performance of the contract legally impossible. Afterwards, the vessel owner sued for breach of the charter party, but it was held that as there had been no actual failure of performance before the war broke out (for the running days had not then expired), and as the renunciation of the contract had not been accepted and, acted upon as a breach, the charterer was entitled to the discharge of the contract, which took place upon the declaration of war.<sup>106</sup>

Though the rule as stated above is almost universally recognized, the Massachusetts court has held that a renunciation before the time for performance has arrived does not amount to a breach; that, to render a person liable “for breach of an executory personal contract, the other party must show a refusal or neglect to perform at a time when, and under conditions such that, he is or might be entitled to require performance.”<sup>107</sup>

*In the Course of Performance.*

It may also happen that, in the course of performance of a contract, one of the parties may, by word or act, deliberately and avowedly refuse performance on his part. In such a case the other party is exonerated from a continued performance of his promise, and is at once entitled to bring action.<sup>108</sup> Illustrations of such a discharge are furnished by those cases in which a person contracts for the manufacture and supply of goods to be delivered in certain quantities at specified dates, and, after delivery of a part, the buyer informs the seller not to deliver any more. In such a case, in an action by the sellers, in which they averred readiness and willingness to deliver the rest of the goods, and that they had been prevented from doing so by the buyer, it was contended by the

<sup>106</sup> *Avery v. Bowden*, *supra*.

<sup>107</sup> *Daniels v. Newton*, 114 Mass. 530.

<sup>108</sup> *Cort v. Railway Co.*, 17 Q. B. 127; *Textor v. Hutchings*, 62 Md. 150; *Hoemer v. Wilson*, 7 Mich. 293; *Derby v. Johnson*, 21 Vt. 17; *James v. Adams*, 16 W. Va. 245; *Clement v. Meserole*, 107 Mass. 362; *Parker v. Russell*, 133 Mass. 74; *Haines v. Tucker*, 50 N. H. 311; *McCormick v. Basal*, 46 Iowa, 235; *Gill v. Vogler*, 52 Md. 663; *Smith v. Lewis*, 24 Conn. 624.

buyer that they should show, not merely readiness and willingness to deliver, but actual delivery. The court, however, held the contrary, and stated the principle thus: "When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the manufacturer having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them." <sup>100</sup>

#### SAME—IMPOSSIBILITY CREATED BY PARTY.

272. If a party to a contract, either before the time for performance or in the course of performance, makes performance, or further performance, by him impossible, the other party is discharged, and may sue at once for breach of contract.

If a renunciation of his contract by one of the parties discharges the other, and gives him a right of action, before the time for performance has arrived, it would seem clear that a similar discharge and right of action accrues to him if the other party, by his own act, makes it impossible for him to perform his promise; and so it has been held.<sup>110</sup> Where a lessee, for instance, had prom-

<sup>100</sup> *Cort v. Railway Co.*, supra.

<sup>110</sup> *Lovelock v. Franklyn*, 8 Q. B. 371; *Ford v. Tiley*, 6 Barn. & C. 325; *Bowdell v. Parsons*, 10 East, 359; *Crist v. Armour*, 34 Barb. (N. Y.) 378; *Short v. Stone*, 8 Q. B. 358; *Sheehan v. Barry*, 27 Mich. 217; *Orabtree v. Messersmith*, 19 Iowa, 179; *Hawley v. Keeler*, 53 N. Y. 114; *Smith v. Jordan*, 13 Minn. 246; *Wolf v. Marsh*, 54 Cal. 228; *Lovering v. Lovering*, 13 N. H. 513; *Newcomb v. Brackett*, 16 Mass. 161; *Delamater v. Miller* 1 Cow. (N. Y.) 75; *Bassett v. Bassett*, 55 Me. 127.

ised to assign to another, at any time within seven years from the date of the promise, all his interest in the lease, but before expiration of the seven years assigned his whole interest to another person, it was held that he could be sued at once for breach of contract, without waiting until the end of the seven years. "The plaintiff," it was said in that case, "has a right to say to the defendant: 'You have placed yourself in a situation in which you cannot perform what you have promised. You promised to be ready during the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but, if I now were to tender you the money, you would not be ready.' That is a breach of the contract."<sup>111</sup> The rule also applies where a person promises to execute a lease for a certain term, or a conveyance, and, before the time for executing arrives, executes a conveyance, or a lease covering that term, to another;<sup>112</sup> or where a person promises to sell and deliver goods on a certain day, and, before that day arrives, sells and delivers them to another;<sup>113</sup> or where a person promises to marry, and, before the time for performance arrives, marries another than the promisee.<sup>114</sup> In all of these cases the party, by his own act, renders performance of his promise impossible, and the other party may sue at once for breach of contract, and claim a discharge from performance on his part.

Probably, under some circumstances, as in the case of a renunciation of the contract,<sup>115</sup> the other party might lose his rights in this respect by failure to treat the contract as discharged. A person who has promised to execute a lease or conveyance on a future day, and who, before the time for performance has arrived, has leased or conveyed to another, may nevertheless obtain the

<sup>111</sup> *Lovelock v. Franklyn*, *supra*.

<sup>112</sup> *Ford v. Tilley*, 6 Barn. & C. 325; *Newcomb v. Brackett*, 16 Mass. 161; *Bassett v. Bassett*, 55 Me. 127.

<sup>113</sup> *Bowdell v. Parsons*, 10 East, 359; *Hawley v. Keeler*, 53 N. Y. 114; *Smith v. Jordan*, 13 Minn. 204 (Gil. 246); *Crist v. Armour*, 34 Barb. (N. Y.) 378.

<sup>114</sup> *Short v. Stone*, 8 Q. B. 358; *King v. Kersey*, 2 Ind. 402; *Sheehan v. Barry*, 27 Mich. 217.

<sup>115</sup> *Ante*, p. 647.

title again, and be prepared to perform when the time comes. In such a case the other party, if he has not elected to treat the contract as discharged, would no doubt be bound to accept performance. For obvious reasons, this limitation could not apply to promises to marry; nor could it apply very well to sales of goods, since the use of the goods by another would to some extent affect their value.

Where a party to a contract, by his own voluntary act, in the course of performance, makes performance by him impossible, the other party is discharged, and may at once sue for breach of contract.<sup>116</sup> An illustration of this rule is afforded in a case in which the plaintiff had been engaged by the defendants, for a certain sum, to write a treatise for a serial published by them. The plaintiff incurred expense in preparing his work, and actually completed a part of it, but before it was delivered to the defendants they abandoned the publication of the serial. The plaintiff sued them on the special contract, and also on the quantum meruit for the work and labor expended by him on the treatise. It was argued that he could not recover upon the quantum meruit because, his part of the original contract being unperformed, the contract was not wholly at an end; but the court held that the abandonment of the publication put an end to the contract, and constituted a discharge.<sup>117</sup>

#### BREACH BY FAILURE OF PERFORMANCE.

**273.** Whether or not failure of one party to perform the contract in whole or in part operates as a discharge of the other, or merely gives him a right of action for the breach,

<sup>116</sup> *Planché v. Colburn*, 8 Bing. 14; *Woolner v. Hill*, 93 N. Y. 576; *Lovell v. Insurance Co.*, 111 U. S. 264, 4 Sup. Ct. Rep. 390; *Chicago v. Tilley*, 103 U. S. 146; *Hinckley v. Steel Co.*, 121 U. S. 264, 7 Sup. Ct. Rep. 875; *W. U. Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. Rep. 127.

<sup>117</sup> *Planché v. Colburn*, *supra*. So, also, where a person had been employed by a corporation for a number of years, and the company was voluntarily wound up before the time had expired, so that further performance by it was rendered impossible, the employé was permitted to sue at once for the breach of contract. *Ex parte Maclure*, L. R. 5 Ch. App. 737. And see *Selpel v. Insurance Co.*, 84 Pa. St. 47.

depends upon the nature of the respective promises, or, in other words, on the question whether they are—

- (a) Independent of each other, in which case, as a rule, there is no discharge.
- (b) Conditional upon each other, in which case, as a rule, there is a discharge.

In the cases of discharge by breach with which we have thus far dealt, the party at fault so deals with the contract, by word or act, as to intimate to the other party that performance, or further performance, as the case may be, on his part, is needless. In such cases, as we have seen, the courts hold that the party not in default is not bound to tender performance, but may consider the contractual tie broken, and sue at once for the other's breach. These cases are very clear and simple; but where the breach by one party does not make the contract wholly incapable of performance, and is not accompanied by any overt expression of intention to abandon his rights, it is not always easy to determine whether the other party is thereby discharged, or whether he merely acquires a right of action for the breach. It is necessary in these cases to look to the terms of the contract, and ascertain the intention of the parties as to the nature of their respective promises. The difficulties resolve themselves into the question whether the promises of the parties are independent of, or conditional upon, one another. This question must be discussed at some length; but it may be well to state at the outset that, as a general rule, failure of a party to perform his promise does not discharge the other from liability to perform his, if the promises are independent of each other; but that it is, as a rule, otherwise, if the promises are conditional upon one another.

#### **SAME—INDEPENDENT PROMISES.**

**274.** Failure of one of the parties to a contract to perform an independent promise does not discharge the other party from liability to perform, but merely gives him a right of action for the breach.

**275. A promise may be independent in the following ways:**

- (a) It may be absolute,—that is, wholly unconditional upon performance by the other party; but promises, each of which forms the whole consideration for the other, will not be held independent of one another, unless the intention of the parties to make them independent is clear.
- (b) Its performance may be divisible,—that is, the promise may be susceptible of more or less complete performance, and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of the failure; but the rule does not apply—
  - (1) Where the circumstances show an intent to break the contract.
  - (2) Where such partial breach is made a discharge by the terms of the contract.
- (c) It may be subsidiary,—that is, the promise broken may be a term of the contract which the parties have not regarded as vital to its existence.

*Absolute Promises.*

If a person makes a promise to another in consideration of a promise by the latter to him, and has not in express terms, or upon a reasonable construction of the contract, made the performance of his promise depend upon performance by the other party, he is not discharged by the latter's breach of his promise.<sup>118</sup> He has given his promise in consideration of the promise of the other party, and not in consideration of performance by the latter of his promise. In other words, he has accepted the latter's liability in return for his own promise. The reason for holding such

<sup>118</sup> *Thorpe v. Thorpe*, 12 Mod. 455; *Thomas v. Cadwallader*, Willea, 490; *Ware v. Chappell*, Style, 186; *Dey v. Dox*, 9 Wend. (N. Y.) 129; *Long v. Caffrey*, 93 Pa. St. 526; *Hard v. Seeley*, 47 Barb. (N. Y.) 428; and cases hereafter cited.



promises absolute was thus stated in a leading case by Holt, C. J.: "What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he makes a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be that A. shall have the horse of B., and A. agree that B. shall have his money, they may make it so, and there needs no averment of performance to maintain an action on either side; but, if it appear by the agreement that the plain intent of either party was to have the thing to be done to him before his doing what he undertakes of his side, it must then be averred,—as, where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and therefore he says the money shall be given for the horse."<sup>119</sup>

When it has once been determined that mutual promises are absolute and independent of each other, there can be little difficulty in applying the law; but it is often very difficult to decide as to the character of a promise in this respect, and this difficulty has resulted in much conflict between the cases. It is impossible to say that there is any general rule for determining the question. The old cases turned upon a very technical construction of terms,<sup>120</sup>

<sup>119</sup> *Thorpe v. Thorpe*, supra. In another case it was stated that, when two covenants in a deed have no relation to each other, the nonperformance of one cannot be pleaded in bar to an action brought for breach of the other, "for this plain reason, amongst others, that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other." *Thomas v. Cadwallader*, supra. But this view of the matter is justly criticised in an American case, in which it is said: "Courts are not required to speculate upon the inequality of loss to the parties, nor to look beyond the agreement, to its performance, in order to ascertain its character, as suggested by some judges and commentators." *Grant v. Johnson*, 5 N. Y. 247.

<sup>120</sup> *Rolle*, Abr. p. 518; *Ware v. Chappell*, supra. In 15 Hen. VII. p. 10, pl. 17, for instance, it was held that if A. covenant with B. to serve him for a year, and B. covenant with A. to give him a certain sum of money, and does not say "for the cause aforesaid," A. shall have an action for the money, though he never serves B., but that it is otherwise if B. says that A. shall have the money "for the cause aforesaid." See 2 Pars. Cont. note r, in which the old and modern cases are collected, and the law reviewed at length.

but the modern cases show, both in England and with us, that the tendency of the courts is not to construe promises to be absolute and independent of one another, where they form the whole consideration for one another, unless there is some very definite expression of an intention of the parties to that effect. "The older cases," it has been said, "lean to construe covenants of this sort to be independent, contrary to the real sense of the parties and the true justice of the case;"<sup>121</sup> but the interpretation of such promises may now be taken to rest upon "the good sense of the case, and on the order in which the several things are to be done."<sup>122</sup> The order in which the things are to be done is a very sure test for determining whether promises are absolute or not.<sup>123</sup> "When it appears that one of two covenants or promises is to be performed at an earlier date than the other, \* \* \* the rule is simple and uniform, namely, that the covenant or promise that

<sup>121</sup> *Glazebrook v. Woodrow*, 8 Term R. 366.

<sup>122</sup> *Morton v. Lamb*, supra; *Stavers v. Curling*, 3 Bing. N. C. 355; *Mill-Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Lowber v. Bangs*, 2 Wall. 728; *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307. Where a bond is given towards the endowment of a professorship in a college, the establishment and endowment of the professorship is not a condition precedent to the collection of the bond. The promises are independent. *Barnett v. College* (Ind. App.) 37 N. E. Rep. 427.

<sup>123</sup> *Mattock v. Kinglake*, 10 Adol. & E. 50; *Couch v. Ingersol*, 2 Pick. (Mass.) 292; *Robson v. Bohn*, 27 Minn. 333, 7 N. W. Rep. 333; *Dey v. Dox*, 9 Wend. (N. Y.) 129; *State v. Railroad Co.*, 21 Minn. 472; *McCoy v. Bixbee*, 6 Ohio, 310; *Slater v. Emerson*, 19 How. 224; *Front St. R. Co. v. Butler*, 50 Cal. 574. *Phillips & Colby Const. Co. v. Seymour*, 91 U. S. 846; *Emigrant Co. v. County of Adama*, 100 U. S. 61. "Where the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent without express words." *Mill-Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Thomas v. Cadwallader*, Willes, 496. Thus, where a person contracts to do certain work in constructing a building for another, and complete it "by Nov. 15th, under a penalty of \$100 per day, provided you have the foundation ready by June 15th," the completion of the foundation is a condition precedent, and, if the foundation is not ready by that time, damages for delay in doing the work cannot be recovered. *Standard Gas-light Co. v. Wood*, 9 C. C. A. 362, 61 Fed. Rep. 74.

is to be performed first is independent and absolute, while the one that is to be performed last is dependent, the performance of the former being a condition precedent to the performance of the latter."<sup>124</sup> Where a person makes a promise to another to convey land, for instance, the date of performance not being fixed, and the other party, in consideration thereof, promises to pay a sum of money at a fixed date, it has been held that the payment is independent of the promise, and that, "a time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase money, without averring performance of the consideration."<sup>125</sup> Where, on the other hand, mutual promises are to be performed at the same time, as where a person promises to convey land or deliver goods to another on a certain day, and the latter, in consideration thereof, promises to pay a sum of money on that day, neither can maintain an action on the other's promise without performing, or offering to perform, his part; and it makes no difference that it does not appear which promise was to be first performed.<sup>126</sup>

Neither this nor any other test, however, can be relied upon in all cases, for often it does not appear when or in what order promises are to be performed. The good sense of each case must determine the construction of the particular contract.<sup>127</sup> Upon the whole, it is said by Anson, it is safe to say that, in the absence of very clear indications to the contrary, promises, each of which forms the whole consideration for the other, will not be held to be independent of one another; and a failure of one party to perform on his part will exonerate the other from liability to perform.<sup>128</sup>

<sup>124</sup> Langd. Sum. Cont. § 122; *Dey v. Dox*, 9 Wend. (N. Y.) 129.

<sup>125</sup> *Mattock v. Kinglake*, supra. And see *Robb v. Montgomery*, 20 Johns. (N. Y.) 15; *Grant v. Johnson*, 5 N. Y. 247; *Goldsborough v. Orr*, 8 Wheat. 217; *Bean v. Atwater*, 4 Conn. 3; *Edgar v. Boles*, 11 Serg. & R. (Pa.) 445; *Lowry v. Mehaffy*, 10 Watts (Pa.) 387; *Kane v. Hood*, 13 Pick. (Mass.) 281; *Runkle v. Johnson*, 30 Ill. 328; *Headley v. Shaw*, 39 Ill. 354.

<sup>126</sup> See the cases above cited; *Williams v. Healey*, 3 Denio (N. Y.) 363; *Gazley v. Price*, 10 Johns. (N. Y.) 267; post, p. 664.

<sup>127</sup> *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307.

<sup>128</sup> *Morton v. Lamb*, 7 Term R. 125; *Graves v. Legg*, 9 Exch. 709; *Dakin v. Williams*, 11 Wend. (N. Y.) 67; *Dey v. Dox*, 9 Wend. (N. Y.) 129; *Bank v. Hagner*, 1 Pet. 455; *Quigley v. De Haas*, 82 Pa. St. 267; *Lutz v. Thompson*, 87 N. C. 334; *Hamilton v. Thrall*, 7 Neb. 210; post, p. 668.

*Promises the Performance of Which is Divisible.*

Contracts frequently occur in which the promise of one or both parties admits of a more or less complete performance, and the damage sustained by an incomplete performance or partial breach of which may be apportioned according to the extent of failure. The performance of the promise in such cases is said to be divisible. The promise is in fact regarded as a number of promises to do a number of similar acts, and a breach of one or some of them does not discharge the other party.<sup>129</sup> On the other hand, the promise may be indivisible or entire, and if it is so, and is not independent of the promise of the other party as heretofore explained, its entire performance is, as a rule, a condition concurrent or precedent to the liability of the other party to perform.<sup>130</sup>

Having once determined that a promise is divisible, it is a comparatively simple matter to apply the law; but the question of divisibility is difficult, and this difficulty has resulted in a direct conflict in the decisions. The question is one of construction. "The contract may be entire or severable, according to the circumstances of each particular case," it has been said in speaking of contracts of sale, "and the criterion is to be found in the question whether the whole quantity—all of the things as a whole—is of the essence of the contract. If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable. It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decision on the subject; but, on the whole, the weight of opinion and the more reasonable rule would seem to be that, where there is a purchase of different articles, at different prices, at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties.' This rule makes the interpretation of the contract depend on the intention of the parties as manifested

<sup>129</sup> *Ritchie v. Atkinson*, 10 East, 295; *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Honck v. Muller*, 7 Q. B. Div. 92; *Hoare v. Rennie*, 5 Hurl. & N. 19; *Norris v. Harris*, 15 Cal. 226; *McGrath v. Cannon* (Minn.) 57 N. W. Rep. 150; *Fullmer v. Poust*, 155 Pa. St. 275, 26 Atl. Rep. 543; note 134, *infra*.

<sup>130</sup> *Hartupee v. Crawford*, 56 Fed. Rep. 61; note 135, *infra*.

by their acts, and by the circumstances of each particular case.”<sup>122</sup> Though this was said in reference to contracts of sale, the reason applies to other contracts as well.<sup>123</sup> Examples of divisible contracts are found in charter parties to load and deliver a complete cargo, and in contracts for the sale of goods in which delivery and acceptance are to take place by installments extending over a considerable period of time. In these contracts it has been laid down, as a general rule, that a breach which only deprives the other party of a part of that to which he was entitled does not discharge him from such performance as may be due from him.

In a leading case the plaintiff had promised to take his ship to a port, and there load a complete cargo of hemp and iron, and to deliver the same on being paid freight at specified rates. He came away with an incomplete cargo, and the defendant refused to pay any freight on the ground that the completeness of the cargo was a condition precedent to any payment being due. Lord Ellenborough said that whether it was so or not depended, “not on any formal arrangement of words, but on the reason and sense of the thing, as it is to be collected from the whole contract;” and with regard to the promise in question he held that “where the freight is made payable upon an indivisible condition, such as the arrival of the ship with her cargo at her destined port of discharge, such arrival must be a condition precedent, because it is incapable of being apportioned; but here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery, leaving the defendant to his remedy in damages for the short delivery.”<sup>124</sup>

Another leading case, decided on similar grounds, was one in which the defendant had agreed with the plaintiffs to supply them with a certain quantity of coal, to be delivered in equal monthly installments for 12 months. Plaintiffs had agreed to send wagons to receive the coal, but during the first month did not send wagons enough to receive the one-twelfth of the whole amount. Defendant sought to rescind the contract, but it was held that he was

<sup>122</sup> *Wooten v. Walters*, 110 N. C. 251, 14 S. E. Rep. 734.

<sup>123</sup> *Broumel v. Rayner*, 68 Md. 47, 11 Atl. Rep. 833.

<sup>124</sup> *Ritchie v. Atkinson*, *supra*.

not entitled to do so, since plaintiffs were willing to continue the contract as to the remaining installments, and it did not appear to have been the intention of the parties to determine the contract upon the failure of one of them to fulfill one of a series of terms.<sup>135</sup> Directly opposed to this case is another, decided some years before. In this case the defendants had bought of the plaintiffs a large quantity of iron, to be shipped in the months of June, July, August, and September in about equal portions each month, and the plaintiffs shipped only a small portion in June, not being nearly the portion stipulated for in that month. It was held that the defendant was not bound to accept the smaller quantity, nor any subsequent tender, as the plaintiffs had substantially failed to perform their part of the contract, which formed a condition precedent to the liability of the defendant.<sup>136</sup> In this country, as will be seen from the cases cited in the notes, some of the courts have followed the former of these cases, while others have followed the latter of them. The cases cannot be reconciled.

<sup>135</sup> *Simpson v. Crippin*, L. R. 8 Q. B. 14. And see *Mersey Steel Co. v. Naylor*, 9 Q. B. Div. 648, 9 App. Cas. 434; *Freeth v. Burr*, L. R. 9 C. P. 208; *Cohen v. Platt*, 69 N. Y. 348; *Gill v. Lumber Co.*, 151 Pa. St. 534, 25 Atl. Rep. 120; *Blackburn v. Reilly*, 47 N. J. Law, 290, 1 Atl. Rep. 27; *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. Rep. 83; *Morgan v. McKee*, 77 Pa. St. 228; *Scott v. Coal Co.*, 89 Pa. St. 231; *Gomer v. McPhee* (Colo. App.) 31 Pac. Rep. 119; *Wooten v. Walters*, 110 N. C. 251, 14 S. E. Rep. 734, 736; *Bollman v. Burt*, 61 Md. 415. "The rule is that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might inure to him from an option to rescind the bargain." *Blackburn v. Reilly*, *supra*.

<sup>136</sup> *Hoare v. Rennie*, 5 Hurl. & N. 19. And see *Houck v. Muller*, 7 Q. B. Div. 92; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12; *Clark v. Steel Works*, 3 C. C. A. 600, 53 Fed. Rep. 494; *Barrie v. Earle*, 143 Mass. 1, 8 N. E. Rep. 639; *King Phillip Mills v. Slater*, 12 R. I. 82; *Shinn v. Bodine*, 60 Pa. St. 182; *Catlin v. Tobias*, 26 N. Y. 217; *Hill v. Blake*, 97 N. Y. 216; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. Rep. 304; *Smith v. Lewis*, 40 Ind. 98; *Dwinel v. Howard*, 30 Me. 258; *Bradley v. King*, 44 Ill. 339.

*Same—Repudiation of Contract.*

The courts are agreed that if a default in one item of a continuous contract of this nature is accompanied with an announcement of intention not to perform the contract upon the agreed terms, or, what amounts to the same thing, if the failure to fully perform is deliberate and intentional, and not the result of inadvertence or inability to perform, the rule we have been discussing does not apply. The other party, under these circumstances, may treat the contract as being at an end.<sup>137</sup>

*Same—Express Provision for Discharge.*

The general rule applicable to contracts of this sort may be contravened by express stipulation. It is always permissible for the parties to agree that the entire performance of a consideration, in its nature divisible, shall be a condition precedent to the right to a fulfillment by the other party of his promise. In such a case nothing can be obtained, either upon the contract or upon a quantum meruit, for what has been performed. All must have been performed.<sup>138</sup> This point is illustrated by a case in which the master of a ship gave a sailor a note promising to pay him 30 guineas, which was more than the ordinary wages, "provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool." The sailor died after having performed the agreement for about seven weeks, but about three weeks before the ship reached Liverpool. The court held that the sailor's representatives could not recover upon the express contract, for its terms were unfulfilled; nor could they recover upon a quantum meruit for such services as he had rendered, because the terms of the express contract excluded the arising of

<sup>137</sup> *Withers v. Reynolds*, 2 Barn. & Adol. 882; *Catlin v. Tobias*, 26 N. Y. 217; *Stephenson v. Cady*, 117 Mass. 6; *Blackburn v. Reilly*, 47 N. J. Law, 290, 1 Atl. Rep. 27; *Rugg v. Moore*, 110 Pa. St. 236, 1 Atl. Rep. 320; ante, pp. 644, 649. So, also, if nonpayment of one installment of goods be accompanied by such circumstances as to give the seller reasonable grounds for thinking that the buyer will not be able to pay for the rest, he may take advantage of this one omission to repudiate the contract. *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Stephenson v. Cady*, supra.

<sup>138</sup> *Cutter v. Powell*, 6 Term. R. 320; 2 Smith, Lead. Cas. 1, and notes; *Leonard v. Dyer*, 26 Conn. 172; *Martin v. Shoenberger*, 8 Watts & S. (Pa.) 367; *Hartley v. Decker*, 89 Pa. St. 470.

any such implied contract as would form the basis of a claim upon a quantum meruit. "It may fairly be considered," it was said, "that the parties themselves understood that, if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage."<sup>139</sup>

*Subsidiary Promises.*

The breach committed by one of the parties may be a breach of a term of the contract only, and of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. The injured party is then bound to continue his performance of the contract, but may bring an action to recover such damages as he has sustained by the default of the other.<sup>140</sup> In a leading case on this point, the plaintiff, a professional singer, had entered into a contract with the defendant, director of an opera, for his services as a singer for a considerable time, and upon a number of terms, one of which was that the plaintiff should be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals. The plaintiff broke this term by arriving only two days before the commencement of the engagement, and the defendant treated this breach as a discharge of the contract. The court held that, in the absence of any express declaration that the term was vital to the contract, it must "look to the whole contract, and see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different, in substance, from what the defendant has stipulated for, or whether it merely partially affects it, and may be compensated for in damages;" and the court held that the term did not go to the root of the matter, so as to constitute a condition precedent.<sup>141</sup>

<sup>139</sup> *Cutter v. Powell*, *supra*.

<sup>140</sup> *Tarrabochia v. Hickie*, 1 Hurl. & N. 183; *Weintz v. Hafner*, 78 Ill. 27; *Boone v. Eyre*, 1 H. Bl. 273, note. It is under this principle that a party is not discharged from his contract by failure of the other party to perform within the time stipulated in the contract, where the time is not of the essence of the contract. *Ante*, p. 596, and cases cited.

<sup>141</sup> *Bettini v. Gye*, 1 Q. B. Div. 183. And see *McAndrew v. Chapple*, L. R. 1 C. P. 643.



The prevailing rule, both in England and with us, is that where a promise is to be performed in the course of the performance of the contract, and after some of the consideration, of which it forms a part, has been given, it will be regarded as subsidiary, and its breach will not effect a discharge unless there be words expressing that it is a condition precedent, or unless the performance of the thing promised be plainly essential to the contract. "Where a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore, the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration."<sup>142</sup>

Another illustration of a subsidiary promise of this nature is to be found in the warranty of quality in a sale of goods. Where a contract of sale is executory, so that the property in the chattel has not passed to the buyer, and the terms of the sale include a promise that the chattel shall possess a particular quality, the acceptance of the chattel by the buyer is conditional on its possessing that quality. Having promised to take and pay for an article of a particular sort, he is not obliged to receive one which is not of the sort he bargained for. But, if the contract of sale be executed,

<sup>142</sup> *Graves v. Legg*, 9 Exch. 716; *Wilson v. Wagar*, 26 Mich. 452; *Lee v. Ashbrook*, 14 Mo. 378; *Nolan v. Whitney*, 88 N. Y. 648; *Haines v. Tucker*, 50 N. H. 307; *Byerlee v. Mendell*, 39 Iowa, 382; *Wolf v. Gerr*, 43 Iowa, 339; *Richards v. Shaw*, 67 Ill. 222; *Nelson v. Oren*, 41 Ill. 18; *White v. Gillman*, 43 Ill. 502; *Lunn v. Gage*, 37 Ill. 19; *Blood v. Enos*, 12 Vt. 625; *Britton v. Turner*, 6 N. H. 481; *Kane v. Stone Co.*, 39 Ohio St. 1; *Ryan v. Dayton*, 25 Conn. 188; *Leonard v. Dyer*, 26 Conn. 172; *Bast v. Byrne*, 51 Wis. 531, 8 N. W. Rep. 494. Though this is the prevailing doctrine, some courts have refused or failed to recognize it. In New York, for instance, it is held that a contract for the sale of goods, to be delivered at specified times, is entire; that the vendee has a right to insist upon its performance as an entirety, unless he waives it; and, where the vendor refuses or fails to perform, the vendee is not bound either to pay for or to return what he has received as a part performance; and the same rule has been applied in the case of building contracts. *Catlin v. Tobias*, 26 N. Y. 217; *Champion v. Rowley*, 18 Wend. (N. Y.) 258; *Smith v. Brady*, 17 N. Y. 173. And see *Clark v. Baker*, 5 Metc. (Mass.) 452; *Haslack v. Mayers*, 26 N. J. Law, 284; *Larkin v. Buck*, 11 Ohio St. 561.

the promise as to quality becomes subsidiary; for, the property having passed, the buyer can only reject the goods if there was an express condition that he might do so, or possibly in the event of the goods being different in description to the terms of the agreement, or wholly worthless in quality. The promise as to quality is, then, a "warranty," in the strict sense of the term; "a stipulation by way of agreement, for the breach of which compensation must be sought in damages;" in other words, a promise to indemnify against failure to perform a term in the contract. Of this we shall presently speak more at length.<sup>143</sup>

### CONDITIONAL PROMISES.

276. Where a promise is subject to a condition, that condition must, as regards its relation to the promise in time, be either—

- (a) Subsequent,
- (b) Concurrent, or
- (c) Precedent.

277. In the case of a condition subsequent, the rights of the promisee are determinable upon a specified event. The condition does not affect their commencement, but its occurrence brings them to a conclusion.

278. In the case of a condition concurrent, the promisee's rights are dependent upon his doing, or being prepared to do, something simultaneously with the performance by the promisor.

279. In the case of a condition precedent, the promisee's rights do not arise until something has been done or has happened, or some period of time has elapsed.

280. Where the promise in a contract is conditional, the promisor may be discharged—

- (a) By the promisee's failure to perform a concurrent condition; that is, to be ready to do something

<sup>143</sup> Post, p. 668.

which should be simultaneous with the performance by the promisor.

- (b) By the fact that there has been a total or substantial failure on the promisee's part to do that which he was bound to do under the contract,—a state of things that may be described as virtual failure of consideration.
- (c) By the untruth of some one statement, or the breach of some one term, which the parties considered to be vital to the contract.

We have already dealt with conditions subsequent in treating of discharge of contract by agreement, and it is unnecessary to speak further of them here.<sup>144</sup>

A condition concurrent, in the case of which, as has been stated, the rights of the promisee are dependent on his doing, or being prepared to do, something simultaneously with the performance of his promise by the promisor, exists in the case of a sale of goods where no time is specified for the payment of the price. Payment and delivery are concurrent conditions, the right of the seller to demand the price being dependent on his readiness to deliver the goods, and the right of the buyer to demand the goods being dependent on his readiness to pay the price.

In the case of conditions precedent, as has been stated, the rights of the promisee do not arise until something has been done or has happened, or some period of time has elapsed.

#### *Breach of Concurrent Condition.*

Concurrent conditions seem, in point of fact, to be conditions precedent, for the simultaneous performance of his promise by each party must needs be impossible except in contemplation of law. What is meant by the phrase is that there must be a concurrent readiness and willingness to perform the mutual promises, and that, if one is not able or willing to do his part, the other is discharged. This form of condition is more particularly applicable to contracts of sale, where payment and delivery are assumed, in the absence of express stipulation, to be intended to be contemporane-

<sup>144</sup> Ante, p. 621.

ous. Where goods are sold, and nothing is said as to the time of the delivery or the time of payment, the seller cannot demand payment of the price unless he is ready at the same time to deliver the goods, and the buyer cannot demand possession of the goods until he pays the price.<sup>145</sup> In an action for breach of a contract by which the plaintiff had agreed to buy a certain quantity of corn of the defendant at a certain price, and the defendant had promised to deliver the corn within one month, the plaintiff merely alleged that he had always been ready and willing to receive the corn, but that it had not been delivered within the month. The court held that readiness to receive was not a sufficient performance of his obligation by the plaintiff; that payment of the price was intended to be concurrent with delivery of the corn. As the plaintiff did not allege that, during the time in which delivery might have been made, he had been ready to pay the price, there was nothing, as he had shaped his case, to show that he had not himself broken the contract and discharged the defendant by nonreadiness to pay.<sup>146</sup>

*Conditions Precedent—Suspensory Conditions.*

We are here dealing with the subject of discharge of contract, and are therefore only concerned with those conditions precedent the nonfulfillment of which is a cause of discharge. To make the subject clear, however, we must mention and explain a class of conditions precedent which do not operate as a discharge, but merely suspend the operation of a promise until they are fulfilled. These are called by Anson floating or suspensory conditions. A promise, for instance, may be conditional upon the happening of an uncertain event, as in the case of a contract of fire or marine insurance,

<sup>145</sup> *Morton v. Lamb*, 7 Term R. 125; *Bloxam v. Sanders*, 4 Barn. & C. 941; *Stephenson v. Cady*, 117 Mass. 6; *Metz v. Albrecht*, 52 Ill. 491; *Hough v. Rawson*, 17 Ill. 588; *Gould v. Bank*, 8 Wend. (N. Y.) 502. See, also, *Russell v. Minor*, 22 Wend. (N. Y.) 659; *Adams v. O'Connor*, 100 Mass. 515; *Allen v. Hartfield*, 76 Ill. 358; *Wabash El. Co. v. Bank*, 23 Ohio St. 311; *Hodgson v. Barrett*, 33 Ohio St. 63; *Henderson v. Lauck*, 21 Pa. St. 359; *Stone v. Perry*, 60 Me. 48; *Turner v. Moore*, 58 Vt. 455, 3 Atl. Rep. 467. So, also, in case of a sale of real estate. *Smith v. Lewis*, 26 Conn. 110; *Swan v. Drury*, 22 Pick. (Mass.) 485; *Clark v. Weiss*, 87 Ill. 438; *Gazley v. Price*, 16 Johns. (N. Y.) 207; *Bank v. Hagner*, 1 Pet. 455.

<sup>146</sup> *Morton v. Lamb*, *supra*.

where the insurer's liability on his promise does not accrue until the loss of the property insured. The condition suspends the operation of the promise.

Again, a promise may depend upon the act of the promisor or of some third person. For instance, it may be made a condition precedent to one party's liability under the contract that he shall approve of, or be satisfied with, the other party's performance; and in such a case, by the weight of authority, he cannot be compelled to accept the other party's performance, and perform his part, unless he is satisfied. Examples of such a condition occur in contracts for the manufacture and sale of goods, or for services, where the buyer's or master's liability to pay is made to depend on his being satisfied with the goods or the services.<sup>147</sup> Other examples are in the case of promises to pay for the construction of a building or of a railroad, or for any other construction work, conditional upon the approval and certificate of the architect, engineer, or other third person. In such cases payment cannot be enforced without such approval unless there is fraud, or such gross mistake as to necessarily imply bad faith.<sup>148</sup>

<sup>147</sup> If a person agrees to manufacture an article for another, or to perform services for him, and the latter only agrees to accept and pay for the article, or for the work, if it is satisfactory to him, he cannot be compelled to accept and pay for it if he is not satisfied. Some courts even hold that it can make no difference that the court thinks he ought to be satisfied, or, in other words, that he may act arbitrarily in refusing to accept. *Brown v. Foster*, 113 Mass. 136; *Gibson v. Cranage*, 39 Mich. 49; *Walter A. Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 505, 15 N. W. Rep. 906; *Zaleski v. Clark*, 44 Conn. 218; *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. Rep. 230; ante, p. 622. Other courts hold that he cannot act arbitrarily, but must express an honest and fair opinion. *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. Rep. 749; *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 3 Atl. Rep. 306; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. Rep. 583. And see *Vought v. Williams*, 120 N. Y. 253, 24 N. E. Rep. 195, and cases there collected; ante, p. 623.

<sup>148</sup> *Morgan v. Birnie*, 9 Bing. 672; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. Rep. 1035; *Kihlberg v. U. S.*, 97 U. S. 398; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. Rep. 344; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. Rep. 290; *Glacius v. Black*, 50 N. Y. 146; *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. Rep. 230; *Kennedy v. Poor*, 151 Pa. St. 472, 25 Atl. Rep. 110; *Gill v. Vogler*, 52 Md. 663; *Lynn v. Railroad Co.*, 60 Md. 404; *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 3 Atl. Rep.

Again, a promise may be conditional in the sense that its operation is postponed until the lapse of a certain time, as in case of a debt for which a fixed period of credit is given, or until the happening of an event that is certain to happen, as in the case of a contract of life insurance.

Or, again, a promise may be conditional in the sense that its operation awaits the performance of some act to be done by the promisee. If no time is specified in which the act is to be done, the nonfulfillment of the condition merely suspends, and does not discharge, the rights of the promisee. Common illustrations of such conditions are furnished by cases of promises conditional upon demand or notice. If a person promises another to do something upon demand, he cannot be sued until demand has been made; or if he promises to do something upon the happening of an event, and stipulates that notice shall be given him of the event having happened, he cannot be sued until such notice has been given. Even if there is no such stipulation for notice, yet, if the happening of the event is peculiarly within the knowledge of the promisee, an implied condition will be imported into the contract that notice must be given before a suit can be maintained.<sup>149</sup>

In all of these cases, neither the nonfulfillment of the condition nor an action brought before fulfillment will discharge the promisor. The condition merely suspends the right to performance of the promise.<sup>150</sup> But the conditions with which we are more particularly concerned effect a discharge of contract by their breach, if not performed at a fixed time or within a reasonable time from the making of the contract; and the breach of such a condi-

306; *Id.*, 65 Md. 611, 9 Atl. Rep. 128; *Lewis v. Railroad Co.*, 49 Fed. Rep. 708. Where there is fraud, or such gross mistake as to necessarily imply bad faith, the action of the architect or engineer is not conclusive on the parties. *Baltimore & O. R. Co. v. Brydon*, *supra*; *Whelen v. Boyd*, 114 Pa. St. 228, 6 Atl. Rep. 384; *Teal v. Bilby*, 123 U. S. 572, 8 Sup. Ct. Rep. 239. On the same principle, a promise to buy land conditional upon the approval of the title by the promisor's attorney will be enforced, notwithstanding the attorney's refusal to approve it, if the title is in fact, and beyond all dispute, good. *Vought v. Williams*, 120 N. Y. 253, 24 N. E. Rep. 195, and cases there cited.

<sup>149</sup> *Makin v. Watkinson*, L. R. 6 Exch. 25.

<sup>150</sup> *Palmer v. Temple*, 9 Adol. & E. 508.

tion is the breach of a term expressly made or necessarily implied in the contract, whereby one party loses either the whole or an essential part of that in consideration of which he made his promise.

*Same—Failure of Consideration.*

A condition precedent, in its narrow sense, is defined by Anson as a single term in a contract, in the form either of a statement or a promise, the untruth or nonperformance of which discharges the contract; but the term is generally used in a broader sense. It is said, for instance, that, where mutual promises or covenants go to the whole consideration on both sides, they are mutual conditions precedent, and performance must be averred.<sup>151</sup> In other words, where the promise of each party is the entire consideration for the promise of the other, then, in the absence of any clear indication that either was to perform his promise first, or that either, as the consideration for his promise, relied solely upon his right of action against the other, neither will be able to sue the other unless he can aver that he has performed, or is ready to perform, his promise; and if performance by one is no longer possible for him, within the terms of the contract, the other will be discharged.<sup>152</sup> Anson, to distinguish these cases from those involving conditions precedent in the narrower sense, describes such a failure of one of the parties to perform as a failure of consideration. Where, as above suggested, the promise of each party is the whole consideration for the promise of the other, and there is no indication that either was to perform his promise first, or that the promises are independent, then the case is one of concurrent conditions; but, as we have seen, concurrent conditions are in effect conditions precedent. In the case of a contract to sell goods, where there is nothing to show a contrary intention, neither party can compel the other to perform until he has performed, or offered to perform, himself; and the same is true of any other contract in which both parties are to perform at the same time.

<sup>151</sup> *Boone v. Eyre*, 1 H. Bl. 273, note.

<sup>152</sup> *Morton v. Lamb*, 7 Term R. 125; *Graves v. Legg*, 9 Exch. 709; *Dakin v. Williams*, 11 Wend. (N. Y.) 67; *Dey v. Dox*, 9 Wend. (N. Y.) 129; *People v. Glann*, 70 Ill. 232; *Bank v. Hagner*, 1 Pet. 455; *Quigley v. De Haas*, 82 Pa. St. 267; *Lutz v. Thompson*, 87 N. C. 334; *Clark v. Collier*, 100 Cal. 256, 34 Pac. Rep. 677; ante, p. 656.

Mutual promises may be the whole consideration for each other, but it may nevertheless appear, either expressly, or impliedly from the nature of the contract, that one is to be performed before the other. In such a case, as we have seen, the promise which is to be first performed is independent, and the promisee may enforce it, or sue for its breach, without having performed, or offered to perform, on his part. The promise of the latter, on the other hand, is conditional; that is, performance by the other is a condition precedent to any liability to perform it.<sup>153</sup> If a person promises to work for another,<sup>154</sup> or to build or repair a house for him,<sup>155</sup> and

<sup>153</sup> Langd. Sum. Cont. § 122; *Dey v. Dox*, 9 Wend. (N. Y.) 129.

<sup>154</sup> In the case of contracts of hiring, the servant must ordinarily perform the services before he is entitled to payment. Performance by him is a condition precedent to the master's liability; and if the servant, after part performance, abandons the contract without legal excuse, he can, according to the weight of authority, recover nothing for the services rendered. He certainly cannot sue on the express contract. *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Stark v. Parker*, 2 Pick. (Mass.) 267; *Thrift v. Payne*, 71 Ill. 408; *Hansell v. Erickson*, 28 Ill. 257; *Miller v. Goddard*, 34 Me. 102. Contra, *McClay v. Hedge*, 18 Iowa, 66; *Britton v. Turner*, 6 N. H. 481; post, p. 781.

<sup>155</sup> In the case of building contracts, a full performance by the contractor according to the terms of the contract is ordinarily a condition precedent to any liability on the part of the owner. *Smith v. Brady*, 17 N. Y. 173; *Coates v. Sangston*, 5 Md. 121. But, if the owner acquiesces in a partial breach of the contract by the contractor, the latter may recover on a quantum meruit for what he has done. *Dermott v. Jones*, 23 How. 220; post, p. 781. The mere fact that the owner occupies the building after a breach of the contract by the contractor is not an acquiescence in, or waiver of, the breach. *Smith v. Brady*, 17 N. Y. 173; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. Rep. 845. Contra, *Presbyterian Church v. Hoopes Artificial Stone, Cement & Paint Co.*, 66 Md. 598, 8 Atl. Rep. 752. If the contractor substantially performs the contract, but fails to comply with it in unimportant particulars, he may nevertheless, if he acted in good faith, recover for what he has done. The amount of his recovery, according to some of the cases, is the contract price, less the difference between the value of the building as completed and its value as it should have been completed, and, according to the others, the contract price, less the sum it would take to complete the building in accordance with the contract. *Glacius v. Black*, 50 N. Y. 145; *Leeds v. Little*, 42 Minn. 414, 44 N. W. Rep. 309; *Stillwell & Bierce Manuf'g Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. Rep. 601; *Gleason v. Smith*, 9 Cush. (Mass.) 484; *Moulton v. McOwen*, 103 Mass. 587; *Cullen v. Sears*, 112 Mass. 200; *Pepper v. City of Philadelphia*, 114 Pa. St. 96, 6 Atl. Rep. 899; *Sticker*



of sale, and allow the buyer to rescind the contract and return the property, even in the absence of an express agreement that he may do so, and in the absence of fraud on the part of the seller.<sup>161</sup> On the other hand, many of the courts do not allow a rescission unless there was an express agreement to that effect,<sup>162</sup> or unless the seller was guilty of fraud.<sup>163</sup> It is difficult, if not impossible, to say which of these rules is supported by the weight of authority. Even where a rescission is not allowed, however, the buyer can exercise rights closely analogous with the right of return, and such as we have described as flowing from the discharge of contract by breach. Thus, he can successfully defend an action for the whole amount of the price;<sup>164</sup> or, if he has paid the price, he can recover it back as money received to his use, on the principle that, where a man has done all or any part of his share of a contract which is afterwards broken by the default of the other party, he may recover upon a quasi contract arising upon the acceptance by the other of money, goods, or services offered by him.<sup>165</sup> The buyer

\* 161 *Bryant v. Isburgh*, 13 Gray (Mass.) 607; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Marston v. Knight*, 29 Me. 341; *Ruff v. Jarrett*, 94 Ill. 475; *Byers v. Chapin*, 28 Ohio St. 300; *Boothby v. Scales*, 27 Wis. 626; *Warder v. Fisher*, 48 Wis. 338, 4 N. W. Rep. 470; *Branson v. Turner*, 77 Mo. 489; *Rogers v. Hanson*, 35 Iowa, 283.

162 *Head v. Tattersall*, L. R. 7 Exch. 7; ante, p. 622.

163 *Behn v. Burness*, 3 Best & S. 755; *Voorhees v. Earl*, 2 Hill (N. Y.) 288; *Muller v. Eno*, 14 N. Y. 597; *Freyman v. Knecht*, 78 Pa. St. 141; *Kase v. John*, 10 Watts (Pa.) 107; *Horn v. Buck*, 48 Md. 358; *Hoover v. Sidener*, 89 Ind. 290; *Hyatt v. Boyle*, 5 Gill & J. (Md.) 111; *Buckingham v. Osborne*, 44 Conn. 133; *Wright v. Davenport*, 44 Tex. 164.

164 In *Poulton v. Lattimore*, 9 Barn. & C. 259, the plaintiff sued the defendant for the price of seed, which had been sold as new growing seed, but which, when sown, proved wholly unproductive. The defendant refused to pay anything for the seed, and his defense was successful to the whole amount of the price.

165 In *Young v. Cole*, 3 Bing. N. C. 724, the defendant had employed the plaintiff as a stockbroker to sell certain bonds. The plaintiff sold them, and paid the price to the defendant, but the bonds turned out to be worthless because unstamped, and were returned to the plaintiff, who took them back, repaid to the purchaser their price, and sued the defendant for the amount which he had paid, as for money received by the defendant to his use. The court held that he could recover, as the purchaser of the bonds was entitled to return them and demand their price back, and the plaintiff had thus been com-

may always retain the goods, and maintain an action for damages sustained by the supply to him of an unmarketable article, or of something different in character to that which he agreed to buy. There needs no express term in the contract to enable him to do this.<sup>166</sup>

Unfortunately, says Anson, the term "implied warranty" has been used to describe terms of this nature. A noncompliance with such terms is in fact a breach of the entire contract,—a substantial failure of consideration. If a person agrees to buy beef of another, it seems hardly reasonable to say that the latter impliedly warrants that he will not supply mutton, or that he will not supply wood. The term "warranty," in this sense, has been emphatically condemned by eminent judges,<sup>167</sup> but it still exists, and tends to obscure the subject of performance and breach of contract.

This matter of failure of consideration has also been introduced into the subject of "Mistake." As a rule, a man makes a contract with an honest intention to keep his promise, and, if he fail to do so, fails from circumstances of which he was not aware, or upon which he did not calculate at the time he made it; and the promisee in like manner expects that he will get what he bargained for. If both are wrong, and the promise is broken by the supply of an article different in kind from what was contemplated, the rights of the promisee are not dependent on the mutual error of the parties, but on the somewhat elementary truth that a contract expressed in unequivocal terms gives a right of action to the party injured by its breach.<sup>168</sup>

elled to make the payment on behalf of the defendant. "It is not a question of warranty," said Tindal, C. J., "but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value." And see *Day v. Pool*, 52 N. Y. 416; *Ferguson v. Hosier*, 58 Ind. 438; *Paul v. Kenosha*, 22 Wis. 256; *Crenshaw v. Slye*, 52 Md. 140; *Vincent v. Leland*, 100 Mass. 432; *Richardson v. Grandy*, 49 Vt. 22; *Scott v. Raymond*, 31 Minn. 437, 18 N. W. Rep. 274; post, pp. 774, 785.

<sup>166</sup> *Mody v. Gregson*, L. R. 4 Exch. 49; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. Rep. 51.

<sup>167</sup> Per Lord Abinger, C. B., in *Chanter v. Hopkins*, 4 Mees. & W. 300. Per Martin, B., in *Azema v. Casella*, L. R. 2 C. P. 677.

<sup>168</sup> Anson, Cont. 302; Pol. Cont. 436, 437.

*Same—In Cases of Divisible Performance Which Wholly Fails.*

The rule further applies to the case of promises which we have described as capable of more or less complete performance, and which may be broken in part without such breach affecting the existence of the contract. Where the performance of a promise is divisible, so that a partial breach will not discharge the other contracting party, a total failure of performance will nevertheless operate as a discharge; and, even where the failure is not total, there may well be a point at which its amount alters the character of the transaction, and makes the tender of any further performance nugatory for the purposes which the contract was originally designed to effect.<sup>169</sup> Thus, in the case already mentioned, in which it was held that the charterer of a vessel, which it was agreed should load and deliver a "complete" cargo, was not discharged because it loaded and delivered an incomplete cargo, it was admitted that, if no cargo had been delivered, the charterer would have been discharged.<sup>170</sup> So, where a singer who had agreed to take the principal part in an opera failed to perform in the opening and early performances, it was held that the other party was discharged.<sup>171</sup>

And the same is true in case of a promise which the parties regard as a subsidiary term in the contract, in so far as its exact performance is not a condition upon which the rights of the promisor depend. If it is broken in such a way as to frustrate the objects of the contract, it operates as a condition, and the breach of it as a discharge. Thus, it was held, in the case of a charter party, that not arriving with due diligence or at a day named is the subject of a cross action only, but that "not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer."<sup>172</sup>

*Same—Conditions Precedent in Narrower Sense.*

In the cases with which we have just been dealing, one of the parties to a contract has been excused from performance of his promise by reason of the entire failure of the consideration which

<sup>169</sup> *Poussard v. Spiers*, L. R. 1 Q. B. Div. 410; *Spalding v. Rosa*, 71 N. Y. 40.

<sup>170</sup> *Ante*, p. 658; *Ritchie v. Atkinson*, 10 East, at page 309.

<sup>171</sup> *Poussard v. Spiers*, *supra*.

<sup>172</sup> *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125.

was to have been given for it. We now come to what Anson calls conditions precedent in the narrower and more frequent use of the term as meaning a single term in the contract, but a term possessing a particular character. In this sense a condition precedent is a statement or promise, the untruth or nonperformance of which discharges the contract.<sup>173</sup> We have already, in discussing independent promises, shown the rules which govern the courts in determining whether a particular promise is conditional or independent.

The chief difficulty with regard to conditions precedent consists in determining whether or not the parties to a contract regarded a particular term as essential. If they did, the term is a condition, and its failure discharges the contract; if they did not, the term is a warranty, and its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term. The word "warranty," says Anson, is used in a most confusing manner and in a great variety of senses, but in its primary sense it is a more or less unqualified promise of indemnity against a failure in the performance of a term in the contract. It is "an express or implied statement of something which the party undertakes shall be a part of a contract, and though part of the contract, yet collateral to the express object of it."<sup>174</sup> If the statement of a party in a contract that a certain thing is true is a condition, the other party is discharged if it is false; but if the statement is a warranty, only, the other party is not discharged, but merely has a right of action for breach of the warranty. A warranty as a mere promise to indemnify.

The question whether a particular term in a contract is a condi-

<sup>173</sup> *Lowber v. Bangs*, 2 Wall. 728; *People v. Glann*, 70 Ill. 232; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. Rep. 13; *Newhall v. Clark*, 3 Cush. (Mass.) 376; *Button v. Russell*, 55 Mich. 478, 21 N. W. Rep. 899; *Cleveland Rolling-Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. Rep. 882; *Husted v. Craig*, 36 N. Y. 221; *Ogden v. Kirby*, 79 Ill. 555; *Kirkpatrick v. Alexander*, 60 Ind. 95; *Harder v. Commissioners*, 97 Ind. 455; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. Rep. 19; *Davison v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. Rep. 346; *Cincinnati, S. & C. R. Co. v. Bensley*, 2 C. C. A. 480, 51 Fed. Rep. 738; *Bell v. Hoffman*, 92 N. C. 273; *Salmon v. Boykin*, 66 Md. 541, 7 Atl. Rep. 701; *Brown v. Ambler*, 66 Md. 391, 7 Atl. Rep. 903.

<sup>174</sup> *Chanter v. Hopkins*, 4 Mees. & W. 399.

tion precedent or a warranty depends upon the construction of each particular contract. The question is to be determined by the intention of the parties, and by the application of common sense to each particular case; and, when the intention is once discovered, it will control technical forms of expression.<sup>175</sup> As said in a leading case: "Parties may think some matter, apparently of very little importance, essential, and, if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and, if they sufficiently express such an intention, it will not be a condition precedent."<sup>176</sup>

A condition precedent may assume the form either of a statement or of a promise.

*Waiver and Acquiescence in Breach of Condition.*

A condition precedent may, in the course of the performance of the contract, change its character, and in effect cease to be a condition. Acquiescence in its breach may turn it into a mere warranty. In other words, a breach of condition, which would discharge a party if at once treated by him as a discharge, will not have this effect if he goes on with the contract instead of repudiating it, and takes a benefit under it; but in such a case he can only recover his damages.<sup>177</sup> If a party wishes to exercise his right to rescind the contract because of the other party's failure to comply with the contract in some substantial particular, he must give the latter clear notice of his intention, unless there are circumstances rendering notice unnecessary;<sup>178</sup> and, where he can do so, he must return, or offer to return, what he has received.<sup>179</sup>

An illustration of such a change in the effect of a condition is

<sup>175</sup> *Stavers v. Curling*, 3 Bing. N. C. 355.

<sup>176</sup> *Bettini v. Gye*, 1 Q. B. Div. 183; ante, p. 661.

<sup>177</sup> *Behn v. Burness*, 3 Best & S. 756; *Graves v. Legg*, 9 Exch. 709; *Pust v. Dowle*, Law J. 32 Q. B. 179; *Winchester & Partridge Manuf'g Co. v. Funge*, 109 U. S. 651, 3 Sup. Ct. Rep. 436; *Bechtel v. Cone*, 52 Md. 698; *Foley v. Crow*, 37 Md. 51; *Carter v. Scargill*, L. R. 10 Q. B. 564.

<sup>178</sup> *Hennessy v. Bacon*, 137 U. S. 78, 11 Sup. Ct. Rep. 17.

<sup>179</sup> *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. Rep. 335.

afforded by a leading English case, in which it appeared that the defendant had chartered the plaintiff's vessel for a certain voyage, and promised to pay a certain sum in full for her use on condition of her taking a cargo of not less than 1,000 tons. The defendant had the use of the vessel as agreed upon, but it appeared that she was not capable of holding so large a cargo as had been made a condition of the contract. To an action brought for non-payment of the freight, the defendant pleaded a breach of this condition. The term in the contract which has been described was held to have amounted, in its inception, to a condition, and it was said that the defendant, while the contract was still executory, might have rescinded, and refused to put any goods on board, but as the contract had been executed, and the defendant had received a substantial part of the consideration, he could not rescind the contract, but must be left to his cross action for damages.<sup>100</sup>

It is said by Anson that the performance thus accepted after the breach of condition must be a substantial part of the consideration, or the condition does not lose its force. The case cited by Anson is one in which the father of an apprentice was sued upon an apprenticeship deed, to which he was a party, by the master, for a discontinuance of service by the son. The boy had served for three years out of a term of five. The father pleaded that the master, having agreed to teach the boy three trades, had abandoned one of them. It was argued that, as the master had given so much of the consideration as a three-years instruction, the condition that he should practice the three trades which he had originally promised to teach had ceased to be a condition precedent, and that the apprentice was not discharged by the breach. The court admitted that "that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less," but held that the failure, though some performance had been accepted, was a failure to fulfill a substantial part of the consideration; that the covenant to teach was a continuing condition precedent to the covenant to serve; and that, in consequence, the rule did not apply.<sup>101</sup>

<sup>100</sup> *Pust v. Dowle*, *supra*.

<sup>101</sup> *Ellen v. Topp*, 6 Exch. 424.

*Breach Caused by the Other Party.*

Though performance by one party of a part or the whole of his promise may be a condition precedent to the liability of the other party to perform, still his failure to perform will not discharge the latter, if the latter prevented performance. In such a case the party so prevented is discharged from further performance, and may recover on the quantum meruit for his part performance.<sup>184</sup>

**DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.**

**281.** Impossibility of performance arising subsequent to the formation of a contract does not discharge the promisor, even though he was not in fault, except—

**EXCEPTIONS—**(a) Where the impossibility arises from a change in the law.

(b) Where the subject-matter is destroyed, the rule being that, where the continued existence of a specific thing is essential to the performance of a contract, its destruction, from no default of either party, operates as a discharge.

(c) In case of incapacity for personal services, the rule being that a contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.

Before proceeding to consider the cases in which impossibility of performance arising subsequently to the formation of a contract will, in certain cases, operate as a discharge, it will be well to say something as to impossibility of performance in general in its relation to contracts, and in doing so to repeat shortly what we have had occasion to say in other connections.

Obvious physical impossibility, or legal impossibility, which is apparent upon the face of the promise, avoids the contract. There is no question of discharge, for the contract is void. There has in fact never been a contract. The reason for this is, as we have

<sup>184</sup> Ante, pp. 644, 649, and cases there cited. See post, p. 777.

seen, that the promise is an unreal consideration for any promise given in return.<sup>185</sup>

Again, impossibility which arises from the nonexistence of the subject-matter of the contract avoids it on the ground of mistake.<sup>186</sup> Here, also, there is no question of discharge from a contract. The question is one of avoidance of the contract, and relates to its formation.

We are here to deal with those cases in which a valid contract has been made, but has become impossible of performance because of facts and circumstances arising subsequent to its formation. The general rule, subject to the exceptions mentioned above, and to be presently discussed, is that such impossibility, even though it arises without any fault on the part of the promisor, does not discharge him from his liability under the contract. Of course he cannot specifically perform his promise, as that has become impossible; but this is no excuse, and he may be held liable as for failure to perform. As we have seen in speaking of conditions subsequent, the promisor may, by the terms of the contract, make the performance of his promise conditional upon its continued possibility, and if he does so the promisee takes the risk, and must bear the loss if performance becomes impossible. If, however, the promisor makes his promise unconditionally, it is his own look-out, and he takes the risk of being held liable, even though performance becomes impossible by reason of circumstances beyond his control.<sup>187</sup> "Where the contract is to do a thing which is pos-

<sup>185</sup> Ante, p. 181.

<sup>186</sup> Ante, p. 200.

<sup>187</sup> *Paradine v. Jane*, Aleyn, 26; *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Kearon v. Pearson*, 7 Hurl. & N. 386; *The Harriman*, 9 Wall. 161; *Jones v. U. S.*, 96 U. S. 24; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; *Harmony v. Bingham*, 12 N. Y. 90; *Booth v. Mill Co.*, 60 N. Y. 487; *Bacon v. Cobb*, 45 Ill. 47; *Kitzinger v. Sanborn*, 70 Ill. 146; *Dermott v. Jones*, 2 Wall. 1; *Steen v. Leonard*, 20 Minn. 494 (Gil. 448); *Harrison v. Railway Co.*, 74 Mo. 364; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530; *Adams v. Nichols*, 19 Pick. (Mass.) 275; *Engster v. West*, 35 La. Ann. 119; *School Trustees v. Bennett*, 27 N. J. Law, 513. Where a person has contracted to build a house, he is neither excused from performance, nor entitled to recover for what he has done, by the fact that the house is destroyed by fire or other cause beyond his control, before its completion and acceptance by the owner. *School Trustees*



sible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control."<sup>188</sup>

In an old case, in which the plaintiff sued for rent due upon a lease, the defendant pleaded that a foreign prince had invaded the realm with a hostile army, and expelled defendant from the premises demised, whereby he could not take the profits out of which the rent should have come. The court held that this was no excuse, "and this difference was taken: that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. \* \* \* But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."<sup>189</sup>

*v. Bennett*, 27 N. J. Law, 513; *Lawing v. Rintles*, 97 N. C. 350, 2 S. E. Rep. 252; *Dermott v. Jones*, 2 Wall. 1; *Fildew v. Besley*, 42 Mich. 100, 3 N. W. Rep. 278. The principle also applies where a person agrees to cut timber and manufacture it into lumber, and the lumber is destroyed by fire before the work is finished. *McDonald v. Bryant*, 73 Wis. 20, 40 N. W. Rep. 665. It is otherwise after the other party has accepted the work, for it is then at his risk. See cases above cited, and see *Galyon v. Ketchen*, 85 Tenn. 55, 1 S. W. Rep. 508. Most, but not all, courts hold that, where a house or a chattel on which a person has agreed to make repairs or do other work is in the owner's control, its destruction before the work is finished will discharge the contract, and the workman may recover for what he has done, and it is immaterial that the work was only to be paid for on completion. See *Wheelan v. Clock Co.*, 97 N. Y. 293; *Hindrey v. Williams*, 9 Colo. 371, 12 Pac. Rep. 436; *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. Rep. 667; *Cleary v. Sohler*, 120 Mass. 210; *Cook v. McCabe*, 53 Wis. 250, 10 N. W. Rep. 507; *Lord v. Wheeler*, 1 Gray (Mass.) 282; *Wells v. Calnan*, 107 Mass. 514; *Haynes v. Baptist Church*, 88 Mo. 285; *Weiss v. Devlin*, 67 Tex. 507, 3 S. W. Rep. 726. But see *Appleby v. Myers*, L. R. 2 C. P. 651; *Brumby v. Smith*, 3 Ala. 123.

<sup>188</sup> *Jones v. U. S.*, *supra*.

<sup>189</sup> *Paradine v. Jane*, *supra*.

*Exceptions to the Rule.*

The exceptions to the rule which we have just discussed must be distinguished from the cases in which the act of God is said to excuse from nonperformance of a contract. There are, as we have seen, certain contracts into which the act of God is introduced as an express, or, by custom, an implied, condition subsequent absolving the promisor; but there are forms of impossibility which are said to excuse from performance because "they are not within the contract,"—that is to say, that neither party can reasonably be supposed to have contemplated their occurrence, so that the promisor neither excepts them specifically nor promises unconditionally in respect of them.<sup>100</sup> These forms of impossibility are where it results (1) from a change of the law; (2) from destruction of the subject-matter of the contract; (3) from incapacity for personal services.

*Same—Change in the Law.*

The first exception to the general rule is that legal impossibility arising from a change in the law of our own country exonerates the promisor.<sup>101</sup> It was so held in an action on a covenant in a lease from the defendant to the plaintiff, by which the defendant agreed that neither he "nor his assigns" would, during the term, erect any but ornamental buildings on adjoining land, which had been retained by the defendant, but which was afterwards taken by a railroad company under legislative authority, and used for

<sup>100</sup> *Baily v. De Crespigny*, L. R. 4 Q. B., at page 185. It must be remembered that, if the impossibility is caused by the act of the promisor, it does not excuse failure to perform. Ante, p. 640. The exceptions do not apply where a person has an option to perform his contract in either of two ways, and it becomes impossible of performance in one of the ways only. In such a case he must perform in the other way. *State v. Worthington*, 7 Ohio, 171; *Drake v. White*, 117 Mass. 10; *Jacquinet v. Boutron*, 19 La. Ann. 30.

<sup>101</sup> *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Cordes v. Miller*, 39 Mich. 581; *Semmes v. Insurance Co.*, 13 Wall. 158; *Brick Presbyterian Church v. City of New York*, 5 Cow. (N. Y.) 538; *Jones v. Judd*, 4 N. Y. 411; *People v. Globe M. L. Ins. Co.*, 91 N. Y. 174; *Buffalo E. S. R. Co. v. Buffalo St. R. Co.*, 111 N. Y. 132, 19 N. E. Rep. 63; *Mississippi & T. R. Co. v. Green*, 9 Heisk. (Tenn.) 588. But there is no discharge when the law merely makes performance more burdensome, though not impossible. *Baker v. Johnson*, 42 N. Y. 120.

the erection of a station. "The legislature," it was said, "by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties."<sup>192</sup> This exception does not apply to the full extent where the impossibility created by a change in the law is only temporary. In such a case liability to perform is only suspended, and the promise must be performed when the impossibility ceases.<sup>193</sup>

*Same—Destruction of the Subject-Matter.*

The second exception to the general rule is that, where the continued existence of a specific thing is essential to the performance of the contract, its destruction from no fault of either party operates as a discharge.<sup>194</sup> A leading case on this subject was one in which the defendant had agreed to let the plaintiff have the use of a music hall for the purpose of giving concerts upon certain days. Before the days of performance arrived, the hall was destroyed by fire, and the plaintiff sued the defendant for losses arising from the consequent breach of contract. The court held that, in the absence of any express stipulation on the matter, the parties must be taken "to have contemplated the continuing existence as the foundation of what was to be done," and that, therefore, "in the absence of any expressed or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."<sup>195</sup>

In speaking of this case, Sir William Anson says: "It will be ob-

<sup>192</sup> Bally v. De Crespigny, *supra*.

<sup>193</sup> Hadley v. Clarke, 8 Term R. 230; Baylies v. Fettyplace, 7 Mass. 325.

<sup>194</sup> Taylor v. Caldwell, 3 Best & S. 826; Dexter v. Norton, 47 N. Y. 62; Wells v. Calnan, 107 Mass. 514; Thompson v. Gould, 20 Pick. (Mass.) 131; Lord v. Wheeler, 1 Gray (Mass.) 282; Walker v. Tucker, 70 Ill. 527; The Tornado, 108 U. S. 342, 2 Sup. Ct. Rep. 746; Ward v. Vance, 93 Pa. St. 499; Gould v. Murch, 70 Me. 288.

<sup>195</sup> Taylor v. Caldwell, *supra*.

served that in this case the court introduces an 'implied condition' into the contract that the subject-matter of it shall continue to exist; whereas in the later case quoted above express note is taken of the fact that the impossibility is 'not within the contract,' and has not been made the subject of any condition; and this, it is submitted, is a more satisfactory interpretation of the rule than to introduce a term into the contract which was never present to the mind of either party to it."<sup>196</sup>

*Same—Incapacity for Personal Services.*

The third exception to the rule that impossibility of performance arising subsequently to the agreement does not discharge the promisor is in the case of contracts for personal services. The rule in these cases is that a contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor, and he may recover on the quantum meruit to the extent of his performance.<sup>197</sup> In an action for damage sustained by a breach of contract on the part of a musician, who, having promised to perform at a concert, was prevented from doing so by a dangerous illness, the law governing the case was thus stated: "This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that by virtue of the terms of the original bargain incapacity

<sup>196</sup> Anson, Cont. 324.

<sup>197</sup> Robinson v. Davison, L. R. 6 Exch. 269; Boast v. Firth, L. R. 4 C. P. 1; Spalding v. Rosa, 71 N. Y. 40; Wolf v. Howes, 20 N. Y. 197; Clark v. Gilbert, 26 N. Y. 279; Green v. Gilbert, 21 Wis. 401; Jennings v. Lyons, 39 Wis. 553; Lakeman v. Pollard, 43 Me. 463; Shultz v. Johnson, 5 B. Mon. (Ky.) 497; Harrington v. Iron-Works Co., 119 Mass. 82; Stewart v. Loring, 5 Allen (Mass.) 306; Fuller v. Brown, 11 Metc. (Mass.) 440; Scully v. Kirkpatrick, 79 Pa. St. 324; Allen v. Baker, 86 N. C. 91; Fenton v. Clark, 11 Vt. 537; Hubbard v. Belden, 27 Vt. 645. So the death of the employer discharges the employee from performance, Yerrington v. Green, 7 R. I. 589; but not the death of one of two joint employers, Martin v. Hunt, 1 Allen (Mass.) 419. A servant is not discharged from liability to perform his contract by the fact that he is arrested and detained in jail, even though it is without any fault of his. In such a case he breaks his contract, and the master may rescind. Leopold v. Salkey, 89 Ill. 412. See post, p. 746.

of body or mind in the performer, without default on his or her part, is an excuse for nonperformance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so, and, as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional, and not absolute."<sup>198</sup>

On the same principle it has been held that where, from the prevalence of a contagious and fatal disease in the vicinity of the place where one has contracted to labor for a specified time, the danger is such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there, it is a sufficient cause for not fulfilling the contract.<sup>199</sup> The rule that the death of a person discharges his contract to render personal services has been held not to apply where the services are of such a character that they may be just as well performed by his personal representative.<sup>200</sup>

*Same—Performance Prevented by the Promisee.*

If performance of a promise is prevented by the promisee, there is no breach of contract by the promisor.<sup>201</sup>

#### DISCHARGE BY OPERATION OF LAW.

282. There are rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract; as in case of

- (a) Merger.
- (b) Alteration of a written instrument.
- (c) Proceedings in bankruptcy.

<sup>198</sup> Robinson v. Davison, *supra*.

<sup>199</sup> Lakeman v. Pollard, 43 Me. 403. But see Dewey v. School Dist., 43 Mich. 480, 5 N. W. Rep. 648.

<sup>200</sup> Hawkins v. Ball, 18 B. Mon. (Ky.) 816; Siler v. Gery, 86 N. C. 566; Janin v. Brown, 59 Cal. 37; Billing's Appeal, 106 Pa. St. 558; Howe Sewing Mach. Co. v. Rosensteel, 24 Fed. Rep. 583; Shultz v. Johnson, 5 B. Mon. (Ky.) 497.

<sup>201</sup> Black v. Woodrow, 39 Md. 194; Smith v. Alker, 102 N. Y. 87, 5 N. E. Rep. 791; *ante*, p. 678.

**SAME—MERGER.**

**283.** Acceptance of a higher security in the place of a lower merges or extinguishes the lower, but

- (a) The two securities must be different in their legal operation; the one of a higher efficacy than the other.
- (b) The subject-matter of the two securities must be identical.
- (c) The parties must be the same.

The merger of a lower in a higher security does not depend on the intention of the parties. The mere acceptance of the higher security ipso facto extinguishes the lower.<sup>203</sup> We shall presently see an instance of this form of discharge in the case of a judgment recovered in an action for breach of contract. The judgment extinguishes by merger the right of action arising from the breach. In like manner, if the parties to a simple contract embody its contents in a deed which they both execute, the simple contract is discharged.<sup>203</sup> In order to effect a merger, the two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security, taken in addition to one similar in character, will not affect its validity unless there be a discharge by substituted agreement.<sup>204</sup> It is also necessary that the subject-matter of the two securities shall be identical,<sup>205</sup> and that the parties shall be the same.<sup>206</sup> Even a security of a higher nature,

<sup>202</sup> *Butler v. Miller*, 1 Denio (N. Y.) 407; *Price v. Moulton*, 10 C. B. 561; *Banorjee v. Hovey*, 5 Mass. 11; *Jones v. Johnson*, 3 Watts & S. (Pa.) 276; *Moale v. Hollins*, 11 Gill & J. (Md.) 11; *Kiefer v. Zimmerman*, 22 Md. 274; *Wann v. McNulty*, 7 Ill. 335; *Ante*, p. 81.

<sup>203</sup> *Martin v. Hamlin*, 18 Mich. 353; *Howes v. Barker*, 3 Johns. (N. Y.) 506.

<sup>204</sup> *Higgen's Case*, 6 Coke, 45b; *Andrews v. Smith*, 9 Wend. (N. Y.) 53; *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Bill v. Porter*, 9 Conn. 23; *ante*, pp. 82, 631.

<sup>205</sup> *Holmes v. Bell*, 3 Man. & G. 213; *Whitbeck v. Wayne*, 16 N. Y. 532.

<sup>206</sup> *Hooper's Case*, 2 Leon. 110; *Banorjee v. Hovey*, 5 Mass. 11; *Doty v. Martin*, 32 Mich. 462.

if it is taken expressly as a collateral security, will not extinguish the inferior.<sup>297</sup>

It is often said that where a simple oral contract is reduced to writing the written contract merges the oral agreement, but the term "merger," as thus used, is different from the term as we use it here. As we have seen, one security will merge and extinguish another only where the former is of a higher nature. A simple contract in writing is of no higher nature than a simple contract by word of mouth. They are both simple contracts, and there can be no extinguishment by merger of one in the other in the sense in which the term is used in law. What is meant is simply that where the parties have reduced their contract to writing they cannot vary or add to it by parol evidence. It is simply a question of evidence.<sup>298</sup>

#### **SAME—ALTERATION OF A WRITTEN INSTRUMENT.**

**284.** If a deed or contract in writing is altered by addition or erasure, it is discharged, provided the alteration is made—

- (a) In a material part, so that it changes the legal effect of the instrument. It need not necessarily be prejudicial.
- (b) By a party to the contract, or by a stranger with his consent.
- (c) Intentionally.
- (d) Without the consent of the other party.

The alteration of a deed, or of a simple contract in writing, if made under the circumstances stated above, will operate as a discharge of the contract, for the reason that it destroys the identity of the contract, and substitutes an agreement different from that into which the parties entered.<sup>299</sup> The alteration, to have this effect,

<sup>297</sup> *Day v. Leal*, 14 Johns. (N. Y.) 404; *Butler v. Miller*, 1 Denio (N. Y.) 407. And see the cases cited in the preceding note.

<sup>298</sup> *Ante*, p. 564.

<sup>299</sup> *Suffell v. Bank*, 9 Q. B. Div. 555; *Wood v. Steele*, 6 Wall. 80; *Osgood v. Stevenson*, 143 Mass. 399, 9 N. E. Rep. 825; *McGrath v. Clark*, 56 N. Y. 34; *Benedict v. Cowden*, 40 N. Y. 396; *Angle v. Insurance Co.*, 92 U. S. 330;

must be material; that is, it must change the legal effect of the instrument.<sup>210</sup> Whether it is material or not must, of course, depend upon the character of the instrument. Adding words of negotiability to a note, or changing or cutting from a note a memorandum

*Draper v. Wood*, 112 Mass. 315; *Citizens' Bank v. Richmond*, 121 Mass. 110; *Neff v. Horner*, 63 Pa. St. 327; *Kilkelly v. Martin*, 34 Wis. 525; *Montag v. Linn*, 23 Ill. 551; *Gardiner v. Harback*, 21 Ill. 128; *Gillett v. Sweat*, 6 Ill. 475; *Schnewind v. Hackett*, 54 Ind. 248; *Nicholson v. Combs*, 90 Ind. 515; *Holmes v. Trumper*, 22 Mich. 427; *Walt v. Pomeroy*, 20 Mich. 425; *Mersman v. Werges*, 112 U. S. 130, 5 Sup. Ct. Rep. 65; *Marsh v. Griffin*, 42 Iowa, 403; *Woodworth v. Anderson*, 63 Iowa, 503, 19 N. W. Rep. 296; *Aetna Bank v. Winchester*, 43 Conn. 391; *Harsh v. Klepper*, 28 Ohio St. 200; *Davis v. Bauer*, 41 Ohio St. 257; *Thompson v. Massie*, Id. 307; *Morrison v. Garth*, 78 Mo. 434; *Johnson v. Moore*, 38 Kan. 90. Where a negotiable instrument is so altered, the law, according to the weight of authority, does not allow even a bona fide holder to recover upon it as against the parties prior to the one making the alteration. *Norton, Bills & N.* 180; *Cowie v. Halsall*, 4 Barn. & Ald. 197, 3 Starkie, 36; *Rex v. Treble*, 2 Taunt. 328; *Tidmarsh v. Grover*, 1 Maule & S. 735; *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Greenfield Bank v. Stowell*, 123 Mass. 196; *Sudler v. Collins*, 2 Houst. (Del.) 538; *Burchfield v. Moore*, 25 Eng. Law & Eq. 123; *Morehead v. Bank*, 5 W. Va. 74; *Holmes v. Trumper*, *supra*; *Macintosh v. Haydon*, *Ryan & M.* 362; *Hill v. Cooley*, 46 Pa. St. 259; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. Rep. 378; *White v. Hass*, 32 Ala. 430; *Oakey v. Wilcox*, 3 How. (Miss.) 330. As to this, however, there is a conflict of opinion. *Knoxville Nat. Bank v. Clark*, 51 Iowa, 261, 1 N. W. Rep. 491. In respect of negotiable paper, however, it is generally held that "where the party complaining of the alteration has by his negligent conduct made the alteration possible, so that the alteration can be so made either by alteration or erasure as not to excite the suspicion of a careful man, the aggrieved party will be liable upon it to a bona fide holder." *Norton, Bills & N.* 189; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 261, 1 N. W. Rep. 491 (collecting the cases); *Yocum v. Smith*, 63 Ill. 321; *Brown v. Reed*, 79 Pa. St. 370. But see *Burrows v. Klunk*, 70 Md. 451, 17 Atl. Rep. 378.

<sup>210</sup> *Fuller v. Green*, 64 Wis. 159, 24 N. W. Rep. 907 (collecting cases); *Burlingame v. Brewster*, 79 Ill. 515; *Birdsall v. Russell*, 29 N. Y. 220; *Manufacturers' Bank v. Follett*, 11 R. I. 92; *Wessell v. Glenn*, 108 Pa. St. 104; *Miller v. Reed*, 27 Pa. St. 244; *Palmer v. Sargent*, 5 Neb. 223; *Leonard v. Phillips*, 39 Mich. 182. Filling blanks in a contract with the name of the party thereto, or a more specific description of property, will not avoid the contract, since it does not change its legal effect. *Briscoe v. Reynolds*, 51 Iowa, 673, 2 N. W. Rep. 529; *Rowley v. Jewett*, 56 Iowa, 492, 9 N. W. Rep. 353. Figures in the margin of a note being no part of the note, their alteration is immaterial. *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N.



limiting its effect as a negotiable instrument or otherwise,<sup>211</sup> or in any way altering it so as to destroy or change its negotiability;<sup>212</sup> under some circumstances, adding a seal to an instrument, or effacing a seal,<sup>213</sup> changing the date of a note or other security,<sup>214</sup> or the time of payment,<sup>215</sup> or the place of payment,<sup>216</sup> or the amount to be paid, either by lessening or increasing the principal,<sup>217</sup> or by

W. Rep. 177. Where a note is payable on or before a certain day, an alteration making it payable on or before a later day does not discharge the maker, as it still leaves him the right to pay as originally provided. *Drexler v. Smith*, 30 Fed. Rep. 754.

<sup>211</sup> *Benedict v. Cowden*, 49 N. Y. 396; *Walt v. Pomeroy*, 20 Mich. 425; *Gerish v. Glines*, 56 N. H. 9; *Johnson v. Heagan*, 23 Me. 329; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; *Cochran v. Nebeker*, 48 Ind. 459; *Belknap v. Bank*, 100 Mass. 376; *Davis v. Henry*, 13 Neb. 497, 14 N. W. Rep. 523. So where a condition affecting a promissory note was written on a stub to which the note was attached, in a book of blank notes, and the payee afterwards tore the note off, and negotiated it, it was held that the holder could not recover on the note, irrespective of the condition. *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. Rep. 382.

<sup>212</sup> *Booth v. Powers*, 56 N. Y. 22; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Needles v. Shaffer*, 60 Iowa, 65, 14 N. W. Rep. 129; *Belknap v. Bank*, 100 Mass. 376.

<sup>213</sup> *Davidson v. Cooper*, 11 Mees. & W. 778, 13 Mees. & W. 343; *Rawson v. Davidson*, 49 Mich. 607, 14 N. W. Rep. 565. Under some circumstances and in some jurisdictions, the presence or absence of a seal may make no difference. *Truett v. Wainwright*, 4 Gilman (Ill.) 411; *White v. Fox*, 29 Conn. 570.

<sup>214</sup> *Wood v. Steele*, 6 Wall. 80; *Vance v. Lowther*, 1 Exch. Div. 176; *Stephens v. Graham*, 7 Serg. & R. (Pa.) 505; *Walton v. Hastings*, 4 Camp. 223; *Outhwaite v. Luntley*, Id. 179; *Master v. Miller*, 4 Term R. 320; *Hamilton v. Wood*, 70 Ind. 306; *Britton v. Dierker*, 46 Mo. 591; *Owings v. Arnot*, 33 Mo. 406; *Crawford v. Bank*, 100 N. Y. 50, 2 N. E. Rep. 881; *Miller v. Gilleland*, 19 Pa. St. 119.

<sup>215</sup> *Lee v. Murdock*, 4 Pat. App. 261; *Long v. Moore*, 3 Esp. 155, note; *Alderson v. Langdale*, 3 Barn. & Adol. 660; *Lewis v. Kramer*, 3 Md. 265; *Benedict v. Miner*, 58 Ill. 19; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528. But see note 210, *supra*.

<sup>216</sup> *Woodworth v. Bank*, 19 Johns. (N. Y.) 391; *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Whitesides v. Bank*, 10 Bush (Ky.) 501; *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. Rep. 64; *Townsend v. Wagon Co.*, 10 Neb. 615, 7 N. W. Rep. 274; *Adair v. Egland*, 58 Iowa, 314, 12 N. W. Rep. 277; *White v. Hass*, 32 Ala. 430. And see the cases cited in note 215, *supra*. Contra, *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. Rep. 362; *Jacobs v. Hart*, 2 Starkie, 45.

<sup>217</sup> *Goodman v. Eastman*, 4 N. H. 455; *Bank of Commerce v. Bank*, 3 N. Y.

changing the rate of interest, or adding a provision for interest;<sup>218</sup> adding to or withdrawing from an instrument the name of a maker, drawer, or, according to some of the cases, a surety, after the instrument has been executed,<sup>219</sup>—are all material alterations. But “an alteration which only does what the law would do—that is, only expresses what the law implies—is not a material alteration, and therefore would not avoid an instrument.”<sup>220</sup> It is possible

230. Or by altering the currency in which a note is payable, or, if it is payable in merchandise, modifying the character or quality of the goods. *Darwin v. Rippey*, 63 N. C. 318; *Martindale v. Follett*, 1 N. H. 95; *Schwalm v. McIntyre*, 17 Wis. 232.

<sup>218</sup> *Warrington v. Early*, 2 EL. & BL. 763; *McGrath v. Clark*, 56 N. Y. 34; *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. Rep. 274; *Benedict v. Miner*, 58 Ill. 19; *Ivory v. Michael*, 33 Mo. 398; *Whitmer v. Frye*, 10 Mo. 348; *Boalt v. Brown*, 13 Ohio St. 364; *Patterson v. McNeeley*, 16 Ohio St. 348; *Harsh v. Klepper*, 28 Ohio St. 200; *Thompson v. Massie*, 41 Ohio St. 307; *Waterman v. Vose*, 43 Me. 504; *Lee v. Starbird*, 55 Me. 491; *Woodworth v. Anderson*, 63 Iowa, 503, 19 N. W. Rep. 296; *Kilkelly v. Martin*, 34 Wis. 525; *Neff v. Horner*, 63 Pa. St. 327; *Davis v. Henry*, 13 Neb. 497, 14 N. W. Rep. 523; *Holmes v. Trumper*, 22 Mich. 427; *Brown v. Jones*, 3 Port. (Ala.) 420; *Hart v. Clauser*, 30 Ind. 210; *Coburn v. Webb*, 56 Ind. 96; *Fay v. Smith*, 1 Allen (Mass.) 477. Contra in case of insertion of the rate of interest which the instrument was intended to bear. *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. Rep. 589; post, p. 692.

<sup>219</sup> *Bank of Limestone v. Penick*, 5 T. B. Mon. (Ky.) 25; *Pulliam v. Withers*, 8 Dana (Ky.) 98; *Martin v. Thomas*, 24 How. 315; *Shipp v. Suggett*, 9 B. Mon. (Ky.) 5; *Gardner v. Walsh*, 32 Eng. Law & Eq. 162; *Smith v. U. S.*, 2 Wall. 219; *Henry v. Coats*, 17 Ind. 161; *Wallace v. Jewell*, 21 Ohio St. 163; *Hamilton v. Hooper*, 46 Iowa, 515; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. Rep. 856; *Nicholson v. Combs*, 90 Ind. 515. It seems, however, according to the weight of authority in this country, that the addition of the signature of a surety or guarantor, not a joint maker (but see *Brownell v. Winnie*, 29 N. Y. 400), does not discharge the maker of a note. *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. Rep. 65; *Stone v. White*, 8 Gray (Mass.) 589; *McCaughy v. Smith*, 27 N. Y. 39; *Montgomery R. Co. v. Hurst*, 9 Ala. 518; *Wallace v. Jewell*, 21 Ohio St. 172; *Miller v. Finley*, 26 Mich. 249. And it has been held that obtaining signature of second surety does not discharge first surety. *Ward v. Hackett*, 30 Minn. 150, 14 N. W. Rep. 578; *Keith v. Goodwin*, 31 Vt. 268; *Sampson v. Barnard*, 98 Mass. 859. Changing indorser into guarantor is material. *Belden v. Hann*, 61 Iowa, 42, 15 N. W. Rep. 591.

<sup>220</sup> 2 Para. Cont. 720; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Brown v. Pink-*

for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. If, for instance, after the execution and delivery of an unattested bond, the obligee should fraudulently, and with a view to some improper advantage, procure a person who was not present at the execution of the instrument to sign his name thereto as an attesting witness, the obligor would be discharged.<sup>221</sup> The alteration is material in that it might allow proof of the execution of the bond by proving such person's handwriting.<sup>222</sup> So, also, it has been held in England (though the contrary has been held in this country) that, though in a bank note the promise to pay made by the bank is not touched by an alteration in the number of the note, the fact that a bank note is a part of the currency, and that the number placed on it is put to important uses by the bank and by the public for the detection of forgery and theft, causes an alteration in the number to be material, and to invalidate the note.<sup>223</sup> An alteration, therefore, to effect a discharge of the contract, need not be an alteration of the contract, but may be an alteration of the instrument in any material way.

"It is not to the point that the alteration be or be not to the prejudice of the party against whom the liability is sought to be enforced. The courts will not compel the execution of a contract which the parties have never made. They will not sit in judgment

ham, 18 Pick. (Mass.) 172; *Hunt v. Adams*, 6 Mass. 519; *Rudesill v. Jefferson Co.*, 85 Ill. 446; *Houghton v. Francis*, 29 Ill. 244; *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. Rep. 551, 748; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309. An alteration, for instance, which inserts the words "on demand" to express the time of payment, is immaterial, where the note fixed no time of payment, since by law it was payable on demand. *Aldous v. Cornwell*, supra.

<sup>221</sup> *Adams v. Frye*, 3 Metc. (Mass.) 103; *Marshall v. Gougler*, 10 Serg. & R. (Pa.) 164. Even a promissory note may be materially altered by the addition of the name of an attesting witness. *Brckett v. Mountfort*, 12 Me. 72; *Thornton v. Appleton*, 29 Me. 298; *Homer v. Wallis*, 11 Mass. 310; *Smith v. Dunham*, 8 Pick. (Mass.) 246. Contra in case of note. *Fuller v. Green*, 64 Wis. 150, 24 N. W. Rep. 907 (distinguishing some of the cases above cited).

<sup>222</sup> Ante, p. 568.

<sup>223</sup> *Suffell v. Bank*, 9 Q. B. Div. 555. Contra as to bonds. *Birdsall v. Russell*, 29 N. Y. 220; *Elizabeth v. Force*, 29 N. J. Eq. 587.

upon the question whether it be to the prejudice of the party aggrieved or not."<sup>224</sup>

*By Whom.*

It was at one time held in England that any material alteration by a stranger would discharge the contract, and even now it seems to be there held that such an alteration will operate as a discharge, if it was made for the benefit of a party to the contract, and while the instrument was in the party's possession, whether the party knew of or consented to the alteration or not.<sup>225</sup> The doctrine is not recognized to any extent, if at all, in this country. On the contrary, it is held that alteration by a stranger, without the knowledge or consent of the parties, is a mere spoliation, and does not discharge the contract.<sup>226</sup>

*Intent.*

The alteration, to effect a discharge, must be intentional. An alteration by accident or mistake, occurring under such circumstances as to negative the idea of intention, will not invalidate the document.<sup>227</sup> Though there are some cases to the contrary, by the

<sup>224</sup> Norton, Bills & N. 188; Chappell v. Spencer, 23 Barb. (N. Y.) 584; Gardner v. Walsh, 5 El. & Bl. 83; Martin v. Thomas, 24 How. 315; Coburn v. Webb, 56 Ind. 96.

<sup>225</sup> Anson, Cont. 327; Pigot's Case, 11 Rep. 27; Pattinson v. Luckley, L. R. 10 Exch. 330; Master v. Miller, 4 Term R. 320; Davidson v. Cooper, 11 Mees. & W. 778, 13 Mees. & W. 343.

<sup>226</sup> Rees v. Overbaugh, 6 Cow. (N. Y.) 746; Lewis v. Payn, 8 Cow. (N. Y.) 71; Jackson v. Malin, 15 Johns. (N. Y.) 293; Martin v. Insurance Co., 101 N. Y. 498, 5 N. E. Rep. 338; U. S. v. Spalding, 2 Mason, 478, Fed. Cas. No. 16,365; Yeager v. Musgrave, 28 W. Va. 90; Drum v. Drum, 133 Mass. 566; Church v. Fowle, 142 Mass. 12, 6 N. E. Rep. 764; Nichols v. Johnson, 10 Conn. 192; Bigelow v. Stilphen, 35 Vt. 521; Neff v. Horner, 63 Pa. St. 327; Wickes v. Caulk, 5 Har. & J. (Md.) 36; Vogle v. Ripper, 34 Ill. 100; Condict v. Flower, 106 Ill. 105; Rose Clare Lead Co. v. Madden, 54 Ill. 261; Den v. Wright, 7 N. J. Law, 178; Hunt v. Gray, 35 N. J. Law, 227; Eckert v. Louis, 84 Ind. 99; Piersol v. Grimes, 30 Ind. 129; Langenberger v. Kroeger, 48 Cal. 147; Moore v. Ivers, 83 Mo. 29; Medlin v. Platte Co., 8 Mo. 235; Presberry v. Michael, 33 Mo. 542; Andrews v. Calloway, 50 Ark. 358, 7 S. W. Rep. 449; Fullerton v. Sturges, 4 Ohio St. 530.

<sup>227</sup> Wilkinson v. Johnson, 3 Barn. & C. 428; Raper v. Birkback, 15 East. 17; U. S. v. Spalding, 2 Mason, 478, Fed. Cas. No. 16,365; Horst v. Wagner, 43 Iowa, 373; Van Brunt v. Eoff, 35 Barb. (N. Y.) 501; Neff v. Horner, 63 Pa. St. 327; Kountz v. Kennedy, Id. 187.

weight of authority, in so far as the instrument itself is concerned, it is immaterial whether the alteration was with fraudulent intent or not. Innocent but intentional alteration destroys its efficacy. An alteration, however, without fraudulent intent will not prevent recovery on the original consideration for the instrument. Where a bill, note, or other security is given for a valuable consideration existing independently of the instrument, an alteration of the note or bill in a material part by the holder without authority of the maker prevents a recovery upon the instrument whether the alteration was with or without fraudulent intent.<sup>228</sup> If the alteration was made with fraudulent intent, there can be no recovery, even on the original consideration; but such a recovery may be had if the alteration was innocent.<sup>229</sup>

#### *Consent.*

Obviously the alteration must be made without the express or implied consent of the other party, else it would operate as a new agreement. If it was done with the consent of the party claiming a discharge, or without his express consent, but to give effect to the intention of the parties, or if it was afterwards ratified by him, there is no discharge.<sup>230</sup> It follows that where there are several

<sup>228</sup> *Alderson v. Langdale*, 3 Barn. & Adol. 660; *Heath v. Blake*, 28 S. C. 406, 5 S. E. Rep. 842; *Wood v. Steele*, 6 Wall. 80; *Adams v. Frye*, 3 Metc. (Mass.) 103. Contra, *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501. Signing as attesting witness. *Thornton v. Appleton*, 29 Me. 298; *Milberry v. Storer*, 75 Me. 69.

<sup>229</sup> *Norton*, Bills & N. 189; *Atkinson v. Hawdon*, 2 Adol. & E. 628; *Meyer v. Huncke*, 55 N. Y. 412; *Nickerson v. Swift*, 135 Mass. 514; *Booth v. Powers*, 56 N. Y. 22; *Kountz v. Kennedy*, 63 Pa. St. 187; *Hunt v. Gray*, 35 N. J. Law, 227; *Vogle v. Ripper*, 34 Ill. 100; *Morrison v. Huggins*, 53 Iowa, 76, 4 N. W. Rep. 854; *Krouse v. Meyer*, 32 Iowa, 566; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. Rep. 850; *Smith v. Mace*, 44 N. H. 553; *Newell v. Mayberry*, 3 Leigh (Va.) 250; *Gordon v. Robertson*, 48 Wis. 493, 4 N. W. Rep. 579; *Matte-son v. Ellsworth*, 33 Wis. 488; *Alderson v. Langdale*, 3 Barn. & Adol. 660.

<sup>230</sup> *Stoddard v. Penniman*, 113 Mass. 386; *Tompkins v. Corwin*, 9 Cow. (N. Y.) 255; *Commercial Bank v. Warren*, 15 N. Y. 577; *Booth v. Powers*, 56 N. Y. 22; *Myers v. Nell*, 84 Pa. St. 369; *Stiles v. Probst*, 69 Ill. 382; *Hanson v. Crowley*, 41 Ga. 303; *Gardiner v. Harback*, 21 Ill. 128; *Derby v. Thrall*, 44 Vt. 413; *Owen v. Perry*, 25 Iowa, 412; *McRaven v. Crisler*, 53 Miss. 542; *National Bank v. Rising*, 4 Hun (N. Y.) 793; *Duker v. Franz*, 7 Bush (Ky.) 273; *Speake v. U. S.*, 9 Cranch, 28; *Collins v. Collins*, 51 Miss. 311; *Jackson v. Johnson*, 67 Ga. 167. An instrument is not avoided by inserting a provision

promisors or obligors, and some of them consent to an alteration, those so consenting remain bound, but those who do not consent are discharged.<sup>221</sup>

*Loss of Instrument.*

The loss of an instrument only affects the rights of the parties in so far as it occasions a difficulty of proof, except that, in case of the loss of a negotiable instrument, the holder, if he loses it, loses his rights under it, unless he offer to the party primarily liable upon it an idemnity against possible claims.<sup>222</sup>

**SAME—BANKRUPTCY.**

**285.** Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the court an order of discharge.

Discharge by bankruptcy proceedings is statutory, and need not be further mentioned.

**REMEDIES ON BREACH OF CONTRACT.**

**286.** Where a contract is broken by one of the parties, the other party acquires, or may acquire, three distinct rights:

for interest at the rate it was intended to bear, *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. Rep. 589; nor by inserting a more specific description of property described therein, *Rowley v. Jewett*, 56 Iowa, 492, 9 N. W. Rep. 353; nor by filling blanks with the names of parties, place of payment, or otherwise, as intended by the parties, *Briscoe v. Reynolds*, 51 Iowa, 673, 2 N. W. Rep. 529. *Spitler v. James*, 32 Ind. 202; *Gillaspie v. Kelly*, 41 Ind. 158; *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Redlich v. Doll*, 54 N. Y. 234; *Van Duzen v. Howe*, 21 N. Y. 531; *Abbott v. Rose*, 62 Me. 194; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. Rep. 177; *Wilson v. Henderson*, 9 Smedes & M. (Miss.) 375; *Witte v. Williams*, 8 S. C. 290.

<sup>221</sup> *Gardiner v. Harbeck*, *supra*; *Myers v. Nell*, *supra*; *State v. Van Pelt*, 1 Ind. 304; *Warring v. Williams*, 8 Pick. (Mass.) 322; *Davis v. Bauer*, 41 Ohio St. 257.

<sup>222</sup> *Hansard v. Robinson*, 7 Barn. & C. 90; *Confians Quarry Co. v. Parker*, L. R. 3 C. P. 1.

- (a) He may be discharged from further performance.
- (b) If he has done anything under the contract, he has a right to sue on the quantum meruit, a cause of action distinct from that arising out of the original contract, and based upon a contract created by law.
- (c) He has a right of action on the original contract, or term of the contract broken, and may maintain:
  - (1) A suit to obtain damages for the loss sustained by the breach.
  - (2) A suit to obtain specific performance of the contract by the other party.

In the preceding pages we have discussed the rules governing the discharge of contract by breach. It remains now to consider briefly the remedies which are open to the person injured by the breach. We have seen that if a contract is discharged by the breach the party injured is exonerated from further performance, provided he treats the breach as a discharge. Where he relies on a discharge, his remedy is by setting up his discharge as a defense in any action that may be brought by the other party on the contract. In addition to his right to a discharge from performance on his part, he has a right, if he has done anything under the contract, to sue on the quantum meruit for compensation for his partial performance. This cause of action is distinct from that arising out of the original contract. It is based upon a new contract, generally called an implied contract, but really a quasi contract, or contract created by law, because of the receipt by the other party of the benefits of such performance.<sup>233</sup> In addition to these rights, the party so injured by a breach has a right of action based upon the original contract or term of the contract broken. This remedy exists not only where he is discharged by the breach, but also where he is not discharged, or where, though he was entitled to claim a discharge, he has preferred to waive such right, and go on with the contract. His remedy in this case is of two kinds: (1) He may seek, in a

<sup>233</sup> Post, p. 777.

court of law, to obtain damages for the loss he has sustained by himself taking the initiative and bringing an action for damages, or by waiting until the other party sues him, and then asserting his right by a counterclaim, or cross action. He may resort to this remedy whether he claims a discharge by reason of the other's breach or not. (2) He may, in the second place, seek to obtain specific performance of the contract by the other party, by bringing a suit in equity for that purpose. Of course he would not be entitled to such performance unless he performed the contract on his part, or offered to perform it, and therefore he cannot resort to this remedy where he claims a discharge from further performance.

Every breach of contract entitles the party injured to damages, however slight his injury may be. If there is no actual loss, his damages will be but nominal. Specific performance, on the other hand, can only be obtained in the case of certain contracts and under certain circumstances. We will only treat of these two remedies in the most general way, and give briefly some of the elementary rules, for they do not properly come within the scope of our work.

#### **SAME—DAMAGES.**

**287.** Every breach of contract entitles the party injured to sue for damages.

**288.** The rule as to the measure of damages is that the plaintiff is, so far as money can do it, to be placed in the same situation as if the contract had been performed. If he has suffered no actual loss, he is entitled to nominal damages. But—

**LIMITATION OF RULE**—The damages recoverable are only such as might have been supposed by the parties to be the natural result of the breach. Exceptional loss must be a matter of special terms.

**289.** The parties may assess the damages themselves by provision in the contract, but they cannot provide for a penalty.



**290. Damages are by way of compensation, and not of punishment, and, as a rule, only the pecuniary loss can be recovered; but—**

**EXCEPTION—**There is an exception in case of the breach of a promise to marry.

**291. Difficulty in assessing the damages must be met by the jury, but they cannot allow damages that are purely speculative.**

The damages awarded for a breach of contract should represent the loss actually sustained, the rule of the common law being, as stated above, that a party who has been injured by a breach of contract "is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."<sup>224</sup> Every breach of contract gives the injured party a right of action, and the right to a verdict in his favor; but, if no actual loss at all accrues from the breach, he is only entitled to nominal damages,—that is, "a sum of money that may be spoken of, but that has no existence in point of quantity."<sup>225</sup>

*Remote and Proximate.*

The rule just stated is subject to the limitation that only such damages can be recovered as were in the contemplation of the parties. The breach of a contract may result in losses which neither party contemplated or could contemplate at the time the contract was entered into, and the courts have striven to lay down rules by which the limit of damages may be ascertained. The limit must depend upon the nature of the particular contract, and only the most general rules can be laid down. It is said that "the damages to which the plaintiff is entitled are such as might have been supposed by the parties to be the natural result of a breach of the contract; such as might have been in their con-

<sup>224</sup> Per Parke, B., in *Robinson v. Harman*, 1 Exch. 855; *Griffin v. Colver*, 16 N. Y. 489; *Cutting v. Railway Co.*, 13 Allen (Mass.) 381; *Croucher v. Oakman*, 3 Allen (Mass.) 185.

<sup>225</sup> Per Maule, J., in *Beaumont v. Greathead*, 2 C. B. 494; *Excelsior Needle Co. v. Smith*, 61 Conn. 56, 23 Atl. Rep. 693; *Horton v. Bauer*, 129 N. Y. 148, 29 N. E. Rep. 1; *Watts v. Weston*, 62 Fed. Rep. 136; *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. Rep. 760; *Weber v. Squier*, 51 Mo. App. 601.

templation when the contract was made.”<sup>236</sup> Any special loss which might accrue from a breach of contract, but which would not naturally and obviously flow therefrom, must, to be recoverable, be expressly provided for in making the contract. In a leading English case,<sup>237</sup> generally approved and followed in this country, the rules were thus stated: That where a party has broken his contract the damages which the other party should recover should be (1) such as may fairly and reasonably be considered to arise naturally—that is, according to the usual course of things—from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach;<sup>238</sup> that (2) if the damages arose out of special circumstances, communicated and so known to both parties when the contract was made, the damages which the parties would reasonably contemplate would be the amount of injury which would ordinarily follow from the breach of a contract under those special circumstances so known and communicated;<sup>239</sup> but (3) if the special circumstances were wholly unknown to the party breaking the contract, he at the most could

<sup>236</sup> Anson, *Cont.* 310; *Hadley v. Baxendale*, 9 Exch. 341; *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85.

<sup>237</sup> *Hadley v. Baxendale*, *supra*.

<sup>238</sup> *Cutting v. Railway Co.*, 13 Allen (Mass.) 381; *Clark v. Moore*, 3 Mich. 63; *Carnegie v. Holt* (Mich.) 58 N. W. Rep. 623; *Booth v. Mill Co.*, 60 N. Y. 487; *Hamilton v. McPherson*, 28 N. Y. 72; *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. Rep. 1025; *Blagen v. Thompson*, 23 Or. 239, 31 Pac. Rep. 647; *Fleming v. Beck*, 48 Pa. St. 300; *True v. Telegraph Co.*, 60 Me. 9; *Hurd v. Dunsmore*, 63 N. H. 171.

<sup>239</sup> *Booth v. Mill Co.*, 60 N. Y. 487; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. Rep. 1129; *Shepard v. Gaslight Co.*, 15 Wis. 318; *King v. Woodbridge*, 34 Vt. 565; *Smith v. Railroad Co.*, 12 Allen (Mass.) 531; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128. This rule has been criticised, but the criticism is confined to the character of the notice or communication of the special circumstances. Some of the courts, in commenting on it, have held that “a bare notice of special consequences which might result from a breach of the contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient.” *Booth v. Mill Co.*, *supra*; *Bridges v. Stickney*, 38 Me. 361; *McKinnon v. McEwan*, 48 Mich. 108, 48 N. W. Rep. 106; *Snell v. Cottingham*, 72 Ill. 161; *Friend & T. Lumber Co. v. Miller*, 67 Cal. 464, 8 Pac. Rep. 40.

only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any such special circumstances.<sup>340</sup>

*Vindictive, Punitive, or Exemplary Damages.*

Damages in an action for breach of contract are by way of compensation for the loss sustained by the breach, and never by way of punishment; and the plaintiff, therefore, cannot recover more than his pecuniary loss. This is the general rule, but it is subject to an exception in case of a breach of promise of marriage. In such a case, if the promise was broken abruptly, and under humiliating circumstances, or if the defendant acted maliciously and in a way to injure the plaintiff's character, exemplary damages may be recovered.<sup>341</sup>

*Assessment by the Parties.*

The parties to a contract frequently assess the damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. They have the right to do this, but, as we have already seen, they cannot provide for a penalty to be paid by the one who shall break the contract.<sup>342</sup>

*Difficulties in Assessment—Speculative Damages.*

Difficulties may, and very frequently do, arise in assessing the damages for a breach of contract; but it would seem that this fact should not disentitle the plaintiff from having an attempt made to assess them. It has accordingly been held in England and in some of the states that the mere fact that the ascertainment of the damages is difficult cannot deprive him of his right to whatever damages he has suffered as the natural consequence of the breach; that the difficulty, when it arises, must be met by the jury. Thus, where a manufacturer, who was in the habit of sending his goods for exhibition to agricultural shows, and made a profit by the practice,

<sup>340</sup> *Thomas v. Railway Co.*, 62 Wis. 642, 22 N. W. Rep. 827; *Buffalo Barb-Wire Co. v. Phillips*, 64 Wis. 338, 25 N. W. Rep. 208.

<sup>341</sup> *Southard v. Raxford*, 6 Cow. (N. Y.) 254; *Thorn v. Knapp*, 42 N. Y. 474; *Johnson v. Travis*, 33 Minn. 231, 22 N. W. Rep. 624; *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. Rep. 321; *Hughes v. Nolte*, 7 Ind. App. 528, 34 N. E. Rep. 745. As to when exemplary damages cannot be allowed in such an action, see *Clement v. Brown* (Minn.) 59 N. W. Rep. 198.

<sup>342</sup> *Ante*, p. 598.

intrusted goods to a carrier to be sent to a show, under circumstances which should have brought his object to its notice, and they delayed the goods so that they were too late for exhibition, it was held that, though the ascertainment of damages was difficult and speculative, this was no reason for not giving damages.<sup>243</sup> This rule, however, is not generally recognized. In most of the states it is held that profits which would have been realized but for the breach of contract, if they are proven with a sufficient degree of certainty, may be allowed as a proper element of damages, but not if they are not so proven, but are only conjectural. Under no circumstances can speculative or contingent profits be recovered.<sup>244</sup>

#### **SAME—SPECIFIC PERFORMANCE.**

**292. A suit in equity will lie for specific performance of a contract, except—**

**EXCEPTIONS—(a) Where there is an adequate remedy at law.**

**(b) Where the matter of the contract is such that the court cannot supervise and insure performance.**

The allowance of damages for breach of contract is not always adequate to the loss sustained, and therefore a party cannot always obtain an adequate remedy for breach of contract in the courts of common law. These courts have no power to compel specific performance, and specific performance is often the only adequate

<sup>243</sup> *Simpson v. Railway Co.*, 1 Q. B. Div. 274. And see *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. Rep. 264.

<sup>244</sup> *Griffin v. Colver*, 16 N. Y. 489; *Dennis v. Maxfield*, 10 Allen (Mass.) 133; *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81; *Brigham v. Carlisle*, 78 Ala. 243; *Union Refining Co. v. Barton*, 77 Ala. 148; *Fairchild v. Rogers*, 32 Minn. 269, 20 N. W. Rep. 191; *Martin v. Deetz* (Cal.) 36 Pac. Rep. 368; *White v. Miller*, 71 N. Y. 118; *Aetna Ins. Co. v. Nexsen*, 84 Ind. 347; *Goodrich v. Hubbard*, 51 Mich. 62, 16 N. W. Rep. 232; *Allis v. McLean*, 48 Mich. 428, 12 N. W. Rep. 640; *Koch v. Merk*, 48 Ill. App. 26; *Howe Mach. Co. v. Bryson*, 44 Iowa, 159; *Hubbard v. Russell*, 51 Conn. 423; *Rice v. Candle*, 71 Ga. 605; *Lewis v. Insurance Co.*, 61 Mo. 534. Only reasonable certainty is required. *Tennessee & C. R. Co. v. Danforth* (Ala.) 13 South. Rep. 51.

remedy. This remedy, however, is given by courts of equity. They can enforce a promise to do a thing by a decree for specific performance, and a promise to forbear from doing a thing by an injunction. These remedies are peculiar to courts of equity.

The exercise of this jurisdiction by courts of equity is limited by certain rules, some of which we have already noticed in other connections. Thus we have seen that defects in the formation of a contract affords an answer to a claim for specific performance; that the remedy is refused in case of a gratuitous promise, though made under seal; and that an infant cannot obtain specific performance of a contract which cannot be enforced against him.<sup>245</sup> There are many details of the subject into which it is impossible for us to go, the subject being one relating more peculiarly to the jurisdiction of courts of equity than to contracts. We can only deal with it in a very general way. The general limitations on the employment of this remedy are that it will not lie (1) where the common-law remedy of damages is adequate to the loss sustained, or (2) where the matter of the contract is such that the court cannot supervise its execution.

#### *Adequate Remedy at Law.*

The rule is well settled that a suit in equity for specific performance will not lie if there is an adequate remedy at law. It will only lie where the loss cannot be compensated in damages.<sup>246</sup> This rule is well illustrated by the different attitudes which the court has assumed in this matter towards contracts for the sale of land and contracts for the sale of goods. The objects with which a man purchases a particular piece of land are different from those with which he purchases goods. He may be determined, in making the contract, by the merits of the site, or its neighborhood, and these cannot be represented by a money compensation. And again, damages may not prove a complete remedy to the vendor, for it is only by specific performance that he can get rid of all the liabilities at-

<sup>245</sup> *Flight v. Bolland*, 4 Russ. 298. And see *Ten Eyck v. Manning* (N. J. Eq.) 27 Atl. Rep. 900.

<sup>246</sup> *Campbell v. Potter*, 147 Ill. 576, 35 N. E. Rep. 364; *American Box Mach. Co. v. Crossman*, 61 Fed. Rep. 888; *Gove v. City of Biddleford*, 85 Me. 303, 27 Atl. Rep. 264; *Porter v. Water Co.*, 84 Me. 195, 24 Atl. Rep. 814; *Townsend v. Vanderwerker*, 20 D. C. 197.

tached to ownership of the land. Courts of equity will therefore generally grant specific performance of contracts for the sale of land at the suit either of the vendor or of the purchaser.<sup>247</sup> On the other hand, goods of the kind and quality that a person wants, and for which he has contracted, are generally to be purchased elsewhere. Hence specific performance of a contract for the sale of goods will not be decreed,<sup>248</sup> except in the case of specific chattels, the value of which, either from their beauty, the interest attaching to them, or some other cause, cannot be represented by damages.<sup>249</sup>

*Inability of Court to Supervise and Insure Performance.*

A court of equity will not decree specific performance where the matter of the contract is such that it cannot supervise or insure its execution. The court acts in granting this remedy only where it can perform the very thing in the terms specifically agreed upon.<sup>250</sup> This rule is clearly illustrated by the refusal of courts of equity to decree specific performance of contracts involving personal services.<sup>251</sup> According to the modern cases, it will enforce by injunction a promise by a person not to act in a particular way; but it will not attempt by a decree for specific performance to compel a person to render personal services in accordance with his contract, for it could not, from the nature of the contract, insure execution of its decree. In other words, where an executory contract contains both positive and negative promises, and the court is unable to enforce the former directly, it may nevertheless enforce

<sup>247</sup> *Eastern C. R. Co. v. Hawkes*, 5 H. L. 331, 359; *Johnston v. Wadsworth* (Or.) 34 Pac. Rep. 13. But courts of equity will not even compel specific performance of a contract to buy land simply to enforce payment of the purchase money. *Holley v. Anness* (S. C.) 19 S. E. Rep. 646.

<sup>248</sup> *Cuddee v. Rutter*, 1 P. Wms. 569, 5 Vin. Abr. p. 538, § 21; *Lining v. Geddes*, 1 McCord, Eq. (S. C.) 304; *Cowles v. Whitman*, 10 Conn. 121; *Kimball v. Morton*, 5 N. J. Eq. 26; *Rollins Inv. Co. v. George*, 48 Fed. Rep. 776; *Womack v. Smith*, 11 Humph. (Tenn.) 478.

<sup>249</sup> *De Mattos v. Gibson*, 4 De Gex & J. 276; *Buxton v. Lester*, 3 Atk. 384; *Womack v. Smith*, *supra*.

<sup>250</sup> *Wilson v. Railway Co.*, L. R. 9 Ch. App. 279; *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630.

<sup>251</sup> *Lumley v. Wagner*, 1 De Gex, M. & G. 616; *Webb v. England*, 29 Beav. 44; *Clark's Case*, 1 Blackf. (Ind.) 122; *Marble Co. v. Ripley*, 10 Wall. 339. See, however, *Randall v. Latham*, 86 Conn. 48.

the latter by an injunction. Thus where a professional singer was sued by the proprietor of a theater for specific performance of a contract to sing at his theater upon certain terms, and during a certain period to sing nowhere else, the court refused to enforce so much of the contract as related to the promise to sing, but enforced the promise not to sing elsewhere by granting an injunction.<sup>283</sup>

#### **SAME—DISCHARGE OF RIGHT OF ACTION.**

**293.** The right of action arising from a breach of contract can only be discharged in one of three ways:

- (a) By the consent of the parties.
- (b) By the judgment of a court of competent jurisdiction.
- (c) By lapse of time.

#### **SAME—DISCHARGE BY THE CONSENT OF THE PARTIES.**

**294.** Discharge by the consent of the parties may take place either—

- (a) By release, which is a gratuitous waiver of the right of action, and must therefore be under seal.
- (b) By accord and satisfaction, which is an agreement to discharge the right of action based on a consideration which is executed.

##### *Release.*

A release is a gratuitous waiver by a person of a right of action accruing to him from a breach of a promise made to him. There

<sup>283</sup> *Lumley v. Wagner*, *supra*. And see *Donnell v. Bennett*, L. R. 22 Ch. Div. 835; *Marble Co. v. Ripley*, 10 Wall. 339; *McCall v. Braham*, 16 Fed. Rep. 37; *Hoyt v. Fuller* (Super. N. Y.) 19 N. Y. Supp. 962; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. Rep. 678; *Cort v. Lassard*, 18 Or. 221, 22 Pac. Rep. 1054; *Port Clinton R. Co. v. Cleveland & T. R. Co.*, 13 Ohio St. 544; *Daly v. Smith*, 38 N. Y. Super. Ct. 158, 49 How. Pr. 150; *Frank v. Brunneman*, 8 W. Va. 462; *Richardson v. Peacock*, 26 N. J. Eq. 40.

is no consideration for the waiver, and therefore, to be binding, it is necessary that it shall be under seal.<sup>253</sup> As we have seen, a gratuitous promise to forbear from the exercise of a right, if it is not under seal, is not enforceable.<sup>254</sup>

*Accord and Satisfaction.*

An accord and satisfaction differs from a release in the matter of consideration and form. As we have just seen, there need be no consideration for a release, and it must be under seal. An accord and satisfaction is an agreement, which need not be under seal, the effect of which is to discharge the right of action possessed by one of the parties against the other. In order to have this effect, there must be a consideration for the promise of the party entitled to sue. It is further necessary that the consideration shall be executed in his favor, otherwise the agreement is an accord without a satisfaction.<sup>255</sup> The promisor must have obtained what he bargained for in lieu of his right of action, and he must have obtained something more than a mere fresh arrangement as to the payment or discharge of the existing liability.<sup>256</sup> If the agreement is not carried out, the effect is only to substitute one cause of

<sup>253</sup> *Mitchell v. Hawley*, 4 Denio (N. Y.) 414; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122; *Shaw v. Pratt*, 22 Pick. (Mass.) 308; *Hunt v. Brown*, 146 Mass. 253, 15 N. E. Rep. 587; *Ingersoll v. Martin*, 58 Md. 67; *Kidder v. Kidder*, 33 Pa. St. 268.

<sup>254</sup> *Ante*, pp. 184-194.

<sup>255</sup> *Bayley v. Homan*, 3 Bing. N. C. 915; *Lynn v. Bruce*, 2 H. Bl. 317; *Mitchell v. Hawley*, 4 Denio (N. Y.) 414; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408; *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 342; *Kromer v. Helm*, 75 N. Y. 574; *Russell v. Lytle*, 6 Wend. (N. Y.) 390; *Costello v. Cady*, 102 Mass. 140; *Petty v. Allen*, 134 Mass. 265; *Franklin Ins. Co. v. Hamill*, 5 Md. 170; *Flack v. Garland*, 8 Md. 188; *Simmons v. Clark*, 56 Ill. 96; *Pettis v. Ray*, 12 R. I. 344; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. Rep. 476; *Morehouse v. Bank*, 98 N. Y. 503; *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. Rep. 243; *Cobb v. Malone*, 86 Ala. 571, 6 South. Rep. 6; *Lankton v. Stewart*, 27 Minn. 346, 7 N. W. Rep. 300; *Ogilvie v. Hallam*, 58 Iowa, 714, 12 N. W. Rep. 730; *Browning v. Crouse*, 43 Mich. 489, 5 N. W. Rep. 664; *Troutman v. Lucas*, 63 Ga. 466; *Ellis v. Bitzer*, 2 Ohio. 80; *Frost v. Johnson*, 8 Ohio, 393; *Simmons v. Hamilton*, 56 Cal. 493; *Johnson v. Hunt*, 81 Ky. 321; *Hemingway v. Stansell*, 106 U. S. 399, 1 Sup. Ct. Rep. 473; *Tazoo R. Co. v. Fulton* (Miss.) 14 South. Rep. 271.

<sup>256</sup> *McManus v. Bank*, L. R. 5 Exch. 65.



action for another, and this might go on indefinitely.<sup>287</sup> It is not meant by this that a promise can never be received as a satisfaction, but simply that a new promise to pay the whole or a part of the existing debt cannot be so received. A promise of something new, if so received, may amount to an accord and satisfaction.<sup>288</sup> The distinction is not very clear, and some of the cases seem to form an exception to the general rule requiring an accord to be executed. The satisfaction may consist, for instance, in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment;<sup>289</sup> or of new rights against the debtor and third persons, as in the case of a composition with creditors;<sup>290</sup> or of something different in kind from that which the debtor was bound by the original contract to perform;<sup>291</sup> but it must have been taken by the creditor as satisfaction for his claim in order to operate as a valid discharge. There can be no satisfaction without accord or agreement to that effect.<sup>292</sup>

As we have seen, in treating of consideration, a promise by a creditor to forego the residue of the debt on payment of a part by the debtor is without consideration, and such a payment cannot constitute an accord and satisfaction; but if the creditor receives a negotiable instrument, or a chattel of any value at all, the element

<sup>287</sup> *Lynn v. Bruce*, 2 H. L. 319, note 255, *supra*.

<sup>288</sup> *Babcock v. Hawking*, 23 Vt. 561; *Morehouse v. Bank*, 98 N. Y. 503; *Whitney v. Cook*, 53 Miss. 551; *Jones v. Perkins*, 29 Miss. 139; *Helm v. Carron*, 11 Smedes & M. (Miss.) 361; *Christie v. Craige*, 20 Pa. St. 430; *Bradshaw v. Davis*, 12 Tex. 336; *Bennett v. Hill*, 14 R. I. 322; *Schweider v. Lang*, 29 Minn. 254, 13 N. W. Rep. 33.

<sup>289</sup> *Goddard v. O'Brien*, 9 Q. B. Div. 37; *Witherby v. Mann*, 11 Johns. (N. Y.) 518; *Guild v. Butler*, 127 Mass. 386; *Varney v. Conery*, 77 Me. 527, 1 Atl. Rep. 683; *Yates v. Valentine*, 71 Ill. 643; *Gage v. Lewis*, 68 Ill. 604; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. Rep. 405.

<sup>290</sup> *Ante*, p. 194.

<sup>291</sup> *Ante*, p. 190.

<sup>292</sup> *Preston v. Grant*, 34 Vt. 201. To constitute an accord and satisfaction where money is offered and merely accepted, the money must have been offered in satisfaction of the claim with such acts and declarations as amounted to the condition that, if accepted, it should be in satisfaction, and such that the payee was bound to understand that, if he should take it, he must take it subject to the condition. *Preston v. Grant*, *supra*; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551, 5 Atl. Rep. 407.

of consideration is supplied, and the agreement and execution thereof by delivery of the instrument or the chattel is an accord and satisfaction. We have already fully considered this question, and so need not go into it again.<sup>293</sup>

### SAME—DISCHARGE BY JUDGMENT.

295. The right of a party to sue for breach of contract is discharged by the final judgment of a court of competent jurisdiction either in his favor or against him. In the former case the cause of action merges in the judgment, while in the latter the judgment estops him.

When the party entitled to sue for the breach of a contract made with him brings an action in a court of competent jurisdiction, and recovers a judgment, his right of action is thereby discharged. It merges in the judgment.<sup>294</sup> The result of legal proceedings taken upon a broken contract may be thus summarized: The bringing of an action has not of itself any effect in discharging the right of action. Another action may be brought for the same cause in another court, and, though proceedings in such an action would be stayed, if they are merely vexatious, yet if action for the same cause is brought in a home court and in a foreign court, the fact that the defendant is being sued in the latter would not in any way affect his position in the former.<sup>295</sup> When the action is pursued to judgment, a judgment adverse to the plaintiff discharges the obliga-

<sup>293</sup> Ante, pp. 189-193.

<sup>294</sup> *Mason v. Eldred*, 6 Wall. 231; *Smith v. Black*, 9 Serg. & R. (Pa.) 142; *Bank of North America v. Wheeler*, 28 Conn. 433; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207; *Turner v. Plowden*, 5 Gill & J. (Md.) 52; *Oliver v. Holt*, 11 Ala. 574; *Wann v. McNulty*, 2 Gilm. (Ill.) 355; *Boynton v. Ball*, 105 Ill. 627; *Pike v. McDonald*, 32 Me. 418; *Barnes v. Gibbs*, 31 N. J. Law, 317; *Baker v. Baker*, 28 N. J. Law, 13.

<sup>295</sup> *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. Rep. 782; *Wood v. Gamble*, 11 Cush. (Mass.) 8; *O'Reilly v. Railroad Co.*, 16 R. I. 388, 17 Atl. Rep. 171, 906, and 19 Atl. Rep. 244; *Sandwich Manuf'g Co. v. Earl* (Minn.) 57 N. W. Rep. 938; *McJilton v. Love*, 13 Ill. 486; *Sargent v. Granite Co.* (Com. Pl. N. Y.) 26 N. Y. Supp. 737; *Smith v. Lathrop*, 44 Pa. St. 326; *Davis v. Morton*, 4 Bush (Ky.) 442. This does not apply to actions in rem.

tion by estoppel. The plaintiff cannot bring another action for the same cause so long as the judgment stands.<sup>286</sup> The matter is *res judicata*. The judgment may be reversed by a higher court, or a new trial granted, and the parties may be remitted to their original positions.<sup>287</sup>

An adverse judgment, in order to discharge the obligation by estopping the plaintiff from reasserting his claim, must have proceeded upon the merits of the case and must be final. Where the litigation has ended in a discontinuance or a nonsuit, or on demurrer for defect in pleading, so that an actual decision on the merits has not been reached; or the finding of a judge or referee has not passed into a judgment, and so become absolutely fixed and final,—the proceedings have no conclusive character, and cannot operate as a bar.<sup>288</sup> So, if a plaintiff fails in his action because he has sued in a wrong character, or had no capacity to sue, or because he sued at a wrong time, as in case of an action brought before fulfillment of a condition in the contract, such as the expiration of a period of credit on the sale of goods,—a judgment proceeding on these grounds will not prevent him from succeeding in a second action.<sup>289</sup> It is also necessary that the judgment shall have been rendered by a court of competent jurisdiction and shall be otherwise

<sup>286</sup> *Patrick v. Shaffer*, 94 N. Y. 423; *Norton v. Doherty*, 3 Gray (Mass.) 372; *Winslow v. Stokes*, 3 Jones (N. C.) 285; *Russell v. Place*, 94 U. S. 606; *Cromwell v. Sac Co.*, Id. 351; *Nispel v. Laparle*, 74 Ill. 306.

<sup>287</sup> *Clark v. Bowen*, 22 How. 270; *Mattingly v. Lewisohn* (Mont.) 35 Pac. Rep. 111.

<sup>288</sup> *Webb v. Buckelew*, 82 N. Y. 555; *Audubon v. Insurance Co.*, 27 N. Y. 216; *Leonard v. Barker*, 5 Denio (N. Y.) 220; *Atkins v. Anderson*, 63 Iowa. 739, 19 N. W. Rep. 323; *Taylor v. Larkin*, 12 Mo. 103; *Gould v. Railroad Co.*, 91 U. S. 526; *Linington v. Strong*, 111 Ill. 152; *Gage v. Ewing*, 114 Ill. 15, 28 N. E. Rep. 379; *Schurmeier v. Johnson*, 10 Minn. 319 (Gil. 250); *Haws v. Tiernan*, 53 Pa. St. 192; *Gallup v. Lichter* (Colo. App.) 35 Pac. Rep. 985; *Baugh v. Baugh*, 4 Bibb (Ky.) 556; *Pierce v. Hilton* (Cal.) 36 Pac. Rep. 595; *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. Rep. 571. If a decision dismissing on demurrer was on the merits, the judgment is *res judicata*. *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. Rep. 623.

<sup>289</sup> *Bull v. Hopkins*, 7 Johns. (N. Y.) 22; *McFarlane v. Cushman*, 21 Wis. 406; *Brackett v. People*, 115 Ill. 29, 3 N. E. Rep. 723; *Rodgers v. Levy*, 36 Neb. 601, 54 N. W. Rep. 1080; *Baxter v. Aubrey*, 41 Mich. 13, 1 N. W. Rep. 897; *Wood v. Faut*, 55 Mich. 185, 20 N. W. Rep. 897.

valid.<sup>270</sup> As has been said, if the plaintiff succeeds, and obtains judgment in his favor, the right of action merges in the judgment, and is discharged. A new obligation arises in the judgment, a form of the so-called "contract of record,—a quasi-contractual obligation." The obligation arising from the judgment may be discharged by payment of the judgment debt, or by satisfaction obtained by the creditor from the property of the debtor by the process of execution, or an action quasi ex contractu may be brought upon it.

### SAME—LAPSE OF TIME.

296. Lapse of time may affect the remedy of the parties to a contract, but, in the absence of statutory provision, it cannot affect their rights.

297. In all the states there are statutes of limitation barring actions on contracts unless they are brought within a prescribed time.

Laches may bar the right to relief in equity,<sup>271</sup> and at law a creditor's delay in asserting his claim may raise a rebuttable presumption that the debt is paid;<sup>272</sup> but, aside from this, lapse of time, in the absence of express statutory provision, does not affect the rights of the parties to a contract. The rights arising from a contract are of a permanent and indestructible character, unless either from the nature of the contract or from its terms it is limited in

<sup>270</sup> *Hickey v. Stewart*, 3 How. 750; *Stowell v. Chamberlain*, 60 N. Y. 272; *Reading v. Price*, 3 J. J. Marsh. (Ky.) 62; *Ditch v. Edwards*, 1 Scam. (Ill.) 127; *Mount v. Scholes*, 120 Ill. 394, 11 N. E. Rep. 401; *Richardson v. Aiken*, 84 Ill. 221; *Oleson v. Merrihew*, 45 Wis. 397; *Dailey v. Sharkey*, 29 Mo. App. 518; *Hancock v. Flynn* (Sup.) 8 N. Y. Supp. 133.

<sup>271</sup> *Eads v. Williams*, 4 De Gex, M. & G. 674; *Southcombe v. Bishop*, 6 Hare, 213; *Seculovitch v. Morton* (Cal.) 36 Pac. Rep. 387; *Rogers v. Van Nortwick* (Wis.) 58 N. W. Rep. 757; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. Rep. 399; *Cocanougher v. Green* (Ky.) 20 S. W. Rep. 542; *Rogers v. Saunders*, 16 Me. 92; *Patterson v. Martz*, 8 Watts (Pa.) 374.

<sup>272</sup> *Williams v. Mitchell*, 112 Mo. 300, 20 S. W. Rep. 647; *Knight v. McKinney*, 84 Me. 107, 24 Atl. Rep. 744; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Atkinson v. Dance*, 9 Yerg. (Tenn.) 424; *Stover v. Duren*, 3 Strob. (S. C.) 448; *Walker v. Emerson*, 20 Tex. 706.

point of duration.<sup>278</sup> But though the rights arising from contract are of this permanent character, the remedies arising from their violation are by statutory provision in all of the states withdrawn after a certain lapse of time. Such statutes are known as the "statutes of limitations." These statutes vary somewhat in the different states, and we cannot set them out. We can only mention them in a general way, and call attention to the most general provisions and rules, leaving it for the student in this connection to consult the statutes and decisions of his own state.

It is provided by statute in all the states that actions on contracts must be brought within a certain number of years, or be barred. The time limited varies in the different states. In some states no distinction with respect to the time limited is made between the different kinds of contracts, while in others such a distinction is made. The statute begins to run against a right to sue as soon as the cause of action arises or accrues, and continues to run until the action is barred, unless the case falls within one of the exceptions to be hereafter mentioned.

#### *Commencement of Action.*

It is generally provided that an action is commenced against each defendant, so as to stop the running of the statute in his favor, at the time the summons is served on him, or on a codefendant who is a joint contractor, or, in some states, otherwise united in interest with him; and it is provided in some jurisdictions, with certain limitations, that an attempt to commence an action is equivalent to its commencement when the summons is delivered to the proper officer with the intent that it shall be actually served. If an action is commenced within the time prescribed, and judgment given therein for the plaintiff, and the judgment is arrested or reversed on error or appeal, the plaintiff is allowed to commence a new action within a certain time after such reversal or arrest.

#### *Disabilities and Exceptions.*

Though, as a rule, the statute begins to run as soon as the cause of action accrues, and continues to run until the bar is complete, there are certain circumstances which suspend its operation. It is

<sup>278</sup> Anson, Cont. 316; Llanelly Ry. & Dock Co. v. London & N. W. Ry. Co., L. R. 7 H. L. 550, at page 567.

generally provided that infancy, coverture, insanity, or imprisonment shall, where the person entitled to sue is affected by any of these disabilities when the cause of action accrues, suspend the operation of the statute until the disability is removed. The disability must exist at the time the cause of action accrues. A disability arising after the period of limitation has commenced to run will not affect the operation of the statute. When two or more disabilities exist when the cause of action accrues, the statute does not begin to run until they are all removed.

As a rule, ignorance that a right of action exists will not suspend the operation of the statute. Where, however, that ignorance was produced by the fraud of the defendant, and no reasonable diligence would have enabled the plaintiff to discover that he had a cause of action, the statutory period commences with the discovery of the fraud.

It is generally provided that if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the time limited after his return into the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action.

It is provided in some states that an action cannot be there maintained on a cause of action which arose in another state, territory, or foreign country, if by the laws of that country an action cannot be there maintained by reason of the lapse of time, but an exception is made in the case of causes of action in favor of citizens of the state who have had it from the time it accrued. In the absence of such a provision, the courts do not necessarily give effect to the statute of a sister state or of a foreign country.

It is generally provided that if a person entitled to bring an action dies before the expiration of the time limited, and the cause of action survives, an action may be commenced by his personal representatives after the expiration of that time and within a certain period from his death; and that, if a person against whom an action may be brought dies before the expiration of the time limited, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within a certain time after the issuing of letters testamentary or

of administration. A certain period is also allowed between the death of a person and the granting of letters, which is not to be taken as part of the statutory period.

*Acknowledgment and New Promise.*

In some cases the statute of limitations may be so framed as not merely to bar the remedy, but to extinguish the right; but ordinarily it is only the remedy that is affected, and therefore the right of action, after it has become barred, may be revived. Where a simple contract, for instance, has resulted in a money debt, the right of action may be revived by subsequent acknowledgment or promise. In some jurisdictions there are statutory provisions requiring that the acknowledgment or promise, to be effectual, must be in writing, signed by the party to be charged or his duly-authorized agent. The sort of acknowledgment or promise which has been held to be requisite in order that a simple contract debt may be revived so as to start the running of the statute anew has been thus described: "There must be one of these three things to take the case out of the statute: Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."<sup>274</sup> The application of this principle must in every case turn on questions of construction of the promisor's words. It is a matter of construction.

*Same—Part Payment.*

A debt barred by the statute may also be revived by a part payment. A payment on account of the principal, or a payment

<sup>274</sup> In re River Steamer Co., 6 Ch. App. 822, at page 828. Some of the courts have held that a mere acknowledgment of the debt as existing is sufficient to remove the bar of the statute, even though there may be an express declaration of intention not to pay it; but most courts hold that this is not enough (regarding the statute as one of repose rather than one of presumption), but that the acknowledgment must be of such a nature as to show that the debtor intended to promise to pay. *Biddel v. Brizzalara*, 64 Cal. 354, 30 Pac. Rep. 609; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. Rep. 614; *Heany v. Schwartz*, 155 Pa. St. 154, 25 Atl. Rep. 1078; *Perry v. Chesley*, 77 Me. 393; *Hussey v. Kirkman*, 95 N. C. 63. As to conditional promises, see *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. Rep. 361.

of interest on the debt, will take the contract out of the statute. It is expressly provided by most, if not all, of the statutes requiring a new promise or acknowledgment to be in writing, and signed by the promisor or his agent, that nothing therein contained shall take away or lessen the effect of such part payments. The payment, to have the effect of reviving the debt, must be made with reference to the original debt, and in such a manner as to amount to an acknowledgment of it.<sup>275</sup>

<sup>275</sup> *Waters v. Tompkins*, 2 Comp., M. & R. 722; *Miner v. Lorman*, 56 Mich. 212, 22 N. W. Rep. 265; *State v. Corlies*, 47 N. J. Law, 108; *Sears v. Hicklin*, 3 Colo. App. 331, 33 Pac. Rep. 187; *Benton v. Holland*, 58 Vt. 533, 3 Atl. Rep. 322; *Blaskower v. Steel*, 23 Or. 106, 31 Pac. Rep. 253.



## CHAPTER XII.

### AGENCY. .

- 298. Creation of the Relation—Capacity of Parties.
- 299. How the Relation may Arise.
- 300-301. Form of Authority.
- 302. Agency by Estoppel.
- 303. Ratification.
- 304-305. Effect of Relation—Rights and Liabilities of Principal and Agent inter Se.
- 306. Rights and Liabilities as to Third Persons—Named Principal.
- 307. Name of Principal Undisclosed.
- 308. Existence of Principal Undisclosed.
- 309. Fraud of Agent.
- 310. Determination of the Relation.

In dealing with the operation of contract we noted that though one person cannot, by contract with another, confer rights or impose liabilities upon a third, yet that one person may represent another as being employed by him for the purpose of bringing him into legal relations with a third. Employment for this purpose is called "agency." The employer is called the "principal," and the employed his "agent." In dealing with the subject we shall consider (1) the mode in which the relation of principal and agent is formed; (2) the effects of the relation when formed; and (3) the mode in which the relation is brought to an end.

#### CREATION OF THE RELATION—CAPACITY OF PARTIES.

**298.** Any one may be an agent, but no one can appoint an agent unless he is otherwise capable of contracting.

The contract between principal and agent by which the relation is formed is like any other contract, in so far as the principal is concerned, in requiring capacity to contract. A person who is incapable of entering into a valid contract is incapable of employing

an agent to enter into contracts for him. Any one, however, may be an agent, whether he has capacity to contract or not.<sup>1</sup>

**SAME—HOW THE RELATION MAY ARISE.**

**299. The relation of principal and agent may arise—**

(a) By actual agreement of the parties, evidenced by words or by conduct; and this may be:

(1) By the offer of a promise for an act and performance of the act; or from consideration executed upon request. Cases of gratuitous agency are within this class.

(2) By the offer of an act for a promise, or by the acceptance of an executed consideration. Such are cases of ratification.

(3) By the offer of a promise for a promise, resulting in mutual promises.

(b) By law, from necessity and without actual agreement, or quasi ex contractu.

(1) A wife, for instance, wrongfully left by her husband without means of support, may supply her wants upon his credit.

(2) A common carrier, or the master of a vessel, under certain circumstances, may bind his employer; and the consignee of goods not ordered, or not in accordance with sample, may under some circumstances sell them on account of the consignor.

<sup>1</sup> Mechem, Ag. §§ 44-68; Governor v. Dalley, 14 Ala. 469; Lyon v. Kent, 45 Ala. 656; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436; Chastain v. Bowman, 1 Hill (S. C.) 270; Gray v. Otis, 11 Vt. 628; Hopkins v. Mollinieux, 4 Wend. (N. Y.) 465; Butler v. Price, 110 Mass. 97.

As regards the mode in which the assent of the parties may be signified, we may accept the processes described in treating of offer and acceptance.

It may arise by the offer of a promise for an act, and acceptance by performance of the act, or, in other words, from consideration executed upon request, as where services are asked for in such a manner as to import a promise of indemnity for any loss, risk, or expense incurred in rendering them. Such are all cases of gratuitous agency, in which the parties do not create, and possibly do not contemplate, as between themselves, any legal relation at the time the request is made. The obligation springs up when the service is rendered. The agent then becomes liable for misperformance of his undertaking, and the principal upon his implied promise of indemnity. It is said that a man who undertakes to do a service for another gratuitously is liable only for misfeasance, and not for non-feasance. By this is meant that, where a man undertakes to act as agent or to do any other service for another gratuitously, the contractual liability does not arise until he has entered upon the work, and so affected the position of his employer, and that up to that moment there is nothing but a request to him to do the work importing a promise to indemnify him for losses which he may incur in doing it. He is not bound to perform the services, but, if he undertakes or enters upon the performance of them, he must perform. Where a person, for instance, voluntarily promises another to effect insurance on the latter's property, he is not liable if he neglects to insure at all; but if he does attempt to insure, and negligently, by omitting necessary formalities, takes out a policy upon which there can be no recovery, he is liable for the loss.<sup>2</sup>

Again, the relation may be created by the offer of an act for a promise, or by the acceptance of an executed consideration. Such is the case where a person without authority makes a contract on behalf of another, and the latter subsequently accepts the bargain or ratifies the contract. This we shall presently consider more at length.

<sup>2</sup> *Wilkinson v. Coverdale*, 1 Esp. 74. And see *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Nixon v. Bogin*, 26 S. C. 611, 2 S. E. Rep. 302.

Again, the relation may be created by mutual promises to employ and remunerate on one side, and to do the work required on the other.

*Quasi ex Contractu—Necessity.*

Circumstances operating upon the conduct of the parties may in certain cases create an agency from necessity. A husband is bound to support his wife, and, if he wrongfully leaves her without means of subsistence, she becomes "an agent of necessity to supply her wants upon his credit."<sup>3</sup>

A carrier of goods or a master of a ship may under certain circumstances, in the interest of his employer, pledge his credit, and will be considered to have his authority to do so. So, also, where goods are shipped to a person unordered, or not in correspondence with samples, it has been held that the consignee may, in the interest of the consignor, effect a sale of them.<sup>4</sup>

In none of these cases does the relation of principal and agent arise from agreement. It is imposed by law. It is an agency quasi ex contractu.

*Partnership.*

The contract of partnership confers on each partner an authority to act for the others in the ordinary course of the partnership business, and each partner accepts a corresponding liability for the acts of his copartners.<sup>5</sup>

**SAME—FORM OF AUTHORITY—ESTOPPEL.**

**300. Authority to make a contract under seal must be under seal; but an agent may, under parol authority, attach a seal for his principal in his presence and by his direction.**

**301. Authority to make a parol contract, whether the contract is required by the statute of frauds to be in writ-**

<sup>3</sup> *Eastland v. Burchell*, 8 Q. B. Div. 436; *Seybold v. Morgan*, 43 Ill. App. 39; *Pierpont v. Wilson*, 49 Conn. 450; *Benjamin v. Dockhaur*, 134 Mass. 418; *Watkins v. De Armond*, 89 Ind. 553; *Eller v. Crull*, 99 Ind. 375; *Ferren v. Moore*, 59 N. H. 100.

<sup>4</sup> *Kemp v. Pryor*, 7 Ves. 246.

<sup>5</sup> *Hawken v. Bourne*, 8 Mees. & W. 710; *Tillier v. Whitehead*, 1 Dall. 269; *Lucas v. Bank*, 2 Stew. (Ala.) 280.

ing or not, may, unless otherwise provided by statute, be either in writing, or by word of mouth, or by conduct.

**302. ESTOPPEL**—If a person, by his conduct, holds another out as his agent, he may be estopped to deny his authority to make a parol contract.

In order that an agent may make a binding contract under seal, he must receive authority under seal.\* Such a formal authority is called a "power of attorney." There is an exception to this rule, and it is said to be the only exception,—where the agent affixes the seal of the principal in his presence and by his direction.†

In some states the authority of an agent to make a contract for the sale of land is required by the statute of frauds to be in writing.‡ And in Kentucky authority to bind another as surety is required by statute to be in writing.§ Aside from this and possibly other statutory requirements, authority, even to enter into a con-

\* *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Heath v. Nutter*, 50 Me. 378; *Klme v. Brooks*, 9 Ired. (N. C.) 218; *Rowe v. Ware*, 30 Ga. 278; *Smith v. Perry*, 29 N. J. Law, 74; *Worrall v. Munn*, 5 N. Y. 229; *Shuetze v. Bailey*, 40 Mo. 69; *Elliott v. Stocks*, 67 Ala. 336; *Gordon v. Bulkeley*, 14 Serg. & R. (Pa.) 331; *Wheeler v. Nevins*, 34 Me. 54; *Baker v. Freeman*, 35 Me. 485; *Cummings v. Cassely*, 5 B. Mon. (Ky.) 74; *Cain v. Heard*, 1 Cold. (Tenn.) 163; *Graham v. Holt*, 3 Ired. (N. C.) 300; *Mans v. Worthing*, 4 Ill. 26. For this reason a partner cannot, without authority under seal, bind his copartner by deed. *Harrison v. Jackson*, 7 Term R. 207; *Mackay v. Bloodgood*, *supra*; *Lucas v. Bank*, 2 Stew. (Ala.) 280; *Banorgue v. Hovey*, 5 Mass. 11; *McNaughton v. Partridge*, 11 Ohio, 223. A partner, however, can release a debt to the firm under seal. *Lucas v. Bank*, *supra*. Parol authority is sufficient to enable an agent to make a binding parol contract for a conveyance under seal by the principal, though the agent himself could not so convey without authority under seal. *Ledbetter v. Walker*, 31 Ala. 175; *Baum v. Du Bois*, 43 Pa. St. 260; *Force v. Dutcher*, 18 N. J. Eq. 401. A contract under seal, made by an agent under parol authority, may be binding as a parol contract where the seal may be rejected as surplusage. *Worrall v. Munn*, 5 N. Y. 229; *Tapley v. Butterfield*, 1 Metc. (Mass.) 515.

† *Hanford v. McNair*, *supra*; *Mackay v. Bloodgood*, *supra*; *Ball v. Dunster-ville*, 4 Term R. 313; *Gardner v. Gardner*, 5 Cush. (Mass.) 483.

\* Ante, p. 127.

† Ante, p. 90.

tract required by the statute of frauds to be in writing, need not be given in any special form. Writing or words may indicate the intention of the parties.<sup>10</sup>

*Same—Implied Authority—Conduct.*

Not only is this true, but authority may be implied from conduct. If a master allows his servant or child to habitually purchase goods for him from a tradesman on credit, the latter becomes entitled to look to the master for payment for such things as are supplied to the servant or child in the ordinary course of dealing. So, also, with husband and wife. Marriage and cohabitation do not of themselves imply authority in the wife to pledge her husband's credit; but, if the wife is allowed to deal with a tradesman, the husband will be considered to have held her out as his agent, and will be liable for her purchases.<sup>11</sup> "If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demurrer in respect of such dealings, the tradesman has the right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume."<sup>12</sup> There is nothing, however, in the relation of master and servant, parent and child, or husband and wife to give an inherent authority to the servant, child, or wife.<sup>13</sup> The authority can only

<sup>10</sup> Ante, p. 127; Shaw v. Nudd, 8 Pick. (Mass.) 9; Merritt v. Clason, 12 Johns. (N. Y.) 102; Moreland v. Houghton, 94 Mich. 548, 54 N. W. Rep. 285; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. Rep. 345; Kennedy v. Ehlen, 31 W. Va. 540, 8 S. E. Rep. 398; Watson v. Sherman, 84 Ill. 267; Blacknall v. Parish, 6 Jones, Eq. (N. C.) 70; Curtis v. Blair, 28 Miss. 309; Worrall v. Munn, 5 N. Y. 229; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436. But see Simpson v. Com., 89 Ky. 412, 12 S. W. Rep. 630.

<sup>11</sup> Debenham v. Mellon, 5 Q. B. Div. 403; Fenner v. Lewis, 10 Johns. (N. Y.) 38; Benjamin v. Benjamin, 15 Conn. 347; Gates v. Brower, 9 N. Y. 205; Snell v. Stone, 23 Or. 327, 31 Pac. Rep. 663. So where a husband allows his wife to manage his farm and attend to the business of it. Benjamin v. Benjamin, supra.

<sup>12</sup> Debenham v. Mellon, supra.

<sup>13</sup> Sawyer v. Cutting, 23 Vt. 486; Johnson v. Stone, 40 N. H. 197; Benjamin v. Benjamin, 15 Conn. 347; Owen v. White, 5 Port. (Ala.) 435; Savage v.

spring from the words or conduct of the master, parent, or husband. So, also, a wife may, by her conduct, hold out and constitute her husband as her agent. He has no inherent authority to act for her,<sup>14</sup> but if, by her conduct, she holds him out as her agent, she will be bound by his acts within the scope of his apparent authority.<sup>15</sup>

These relations enable an authority to be the more readily inferred from conduct; but, apart from them, conduct alone may create so strong a presumption of authority as to estop the party from denying its existence.<sup>16</sup> In a case illustrating such a presumption, the plaintiff had allowed a broker to purchase hemp for him, and by plaintiff's desire it was entered in the place of deposit in the broker's name. The broker sold the hemp, and it was held that plaintiff's conduct gave him authority to do so. "Strangers," it was said, "can only look to the acts of the parties and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and, if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."<sup>17</sup> This is called by Anson "agency by estoppel."

Davis, 18 Wis. 608; Gavin v. Bishoff, 80 Iowa, 605, 45 N. W. Rep. 306; Lane v. Ironmonger, 18 Mees. & W. 368; Gulick v. Grover, 31 N. J. Law, 182.

<sup>14</sup> Mead v. Spalding, 94 Mo. 43, 6 S. W. Rep. 384; Gilbert v. Deahon, 107 N. Y. 324, 14 N. E. Rep. 318; McLaren v. Hall, 26 Iowa, 297; Price v. Seydel, 46 Iowa, 690; Trimble v. Thorson, 80 Iowa, 246, 45 N. W. Rep. 742; Runyon v. Snell, 116 Ind. 164, 18 N. E. Rep. 522.

<sup>15</sup> Arnold v. Spurr, 130 Mass. 347; Rankin v. West, 25 Mich. 195; Lavassar v. Washburne, 50 Wis. 200, 6 N. W. Rep. 516.

<sup>16</sup> Pickering v. Busk, 15 East, 38; Gibson v. Hardware Co., 94 Ala. 346, 10 South. Rep. 304; Paine v. Tillinghast, 52 Conn. 532; Pursley v. Morrison, 7 Ind. 356; Emerson v. Miller, 27 Pa. St. 278; Johnson v. Hurley, 115 Mo. 513, 22 S. W. Rep. 492; Pennsylvania R. Co. v. Atha, 22 Fed. Rep. 920; Crane v. Grunewald, 120 N. Y. 274, 24 N. E. Rep. 456; Tier v. Lampson, 35 Vt. 179.

<sup>17</sup> Pickering v. Busk, *supra*.

**SAME—RATIFICATION.**

303. Ratification is where a person adopts a contract made on his behalf by another without authority; and it is governed by the following rules:

- (a) The agent must have contracted as agent, and not on his own account.
- (b) The principal must have been in contemplation, or at least ascertainable, at the time.
- (c) It follows that the principal must have been in existence at the time.
- (d) The contract must have been such as the principal had the legal capacity to make, and must have been lawful.
- (e) A contract may be ratified either by words or by conduct, but to be effectual it must be with a full knowledge, actual or constructive, of all the material facts.

**EXCEPTIONS**—A contract under seal cannot be ratified except under seal, nor can a contract for which written authority is required by statute be ratified except by writing.

- (f) A contract cannot be disaffirmed in part only. If ratified in part, the whole is ratified.

An important mode of creating agency is by ratification. Where a contract is made by one person on behalf of another, but without authority, the latter, on learning of it, may confirm or adopt the contract, and take the benefits and liabilities of it. His ratification relates back, and is equivalent to prior authority.<sup>18</sup>

<sup>18</sup> Nesbitt v. Helser, 49 Mo. 383; Goss v. Stevens, 32 Minn. 472, 21 N. W. Rep. 549; Sheldon Hat-Blocking Co. v. Machine Co., 90 N. Y. 610; Clealand v. Walker, 11 Ala. 1058; Mason v. Caldwell, 5 Gilman (Ill.) 196; Strasser v. Conklin, 54 Wis. 102, 11 N. W. Rep. 254; Starks v. Sikes, 8 Gray (Mass.) 609; McCracken v. City of San Francisco, 16 Cal. 591; Beldman v. Goodell, 56 Iowa, 592, 9 N. W. Rep. 900; Despatch Line v. Bellamy Co., 12 N. H. 205; Kinsley v. Norris, 60 N. H. 131; First Nat. Bank v. Gay, 63 Mo. 33;



That "an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage."<sup>19</sup>

The rules governing ratification are that the agent must have contracted, as agent, for a principal who was in contemplation, and in existence, at the time, either actually or in contemplation of law, and for such things as the principal could and lawfully might do.<sup>20</sup>

(1) In the first place, the agent must have contracted as agent, and not on his own account.<sup>21</sup> A person cannot contract and incur a liability on his own account, and then assign it to some one else under color of ratification. If he has no principal at the time, and contracts in his own name, he can only divest himself of his rights and liabilities by assignment to the latter. If he has a principal at the time, and contracts in his own name, the other party, as we shall presently see, may either hold him personally liable, or may hold the principal liable, at his option.

(2) The agent must have acted for a principal who was in contemplation. He need not have been known, but he must at least have been capable of being ascertained.<sup>22</sup> He must not have made a contract, as agent, with the expectation that parties of whom he was not cognizant at the time would relieve him of

Wallace v. Lawyer, 90 Ind. 499; Persons v. McKibben, 5 Ind. 261. To this statement there is this qualification: "The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification; in other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." Cook v. Tullis, 18 Wall. 332; Wood v. McCain, 7 Ala. 800.

<sup>19</sup> Wilson v. Tumman, 6 Man. & G. 236; Forbes v. Hagman, 75 Va. 178.

<sup>20</sup> Anson, Cont. 335.

<sup>21</sup> Hamlin v. Sears, 82 N. Y. 327; Workman v. Wright, 33 Ohio St. 405; Allred v. Bray, 41 Mo. 484; Beveridge v. Rawson, 51 Ill. 504; Roby v. Cossitt, 78 Ill. 638.

<sup>22</sup> Foster v. Bates, 12 Mees. & W. 226; Roby v. Cossitt, 78 Ill. 638.

his liabilities. The act must have been "done for another by a person not assuming to act for himself, but for such other person."<sup>23</sup> This does not prevent ratification in the case of a broker making contracts, as agent, in the expectation that customers with whom he has been in the habit of dealing will take them off his hands.

(3) The third rule necessarily follows, namely, that the principal must have been in existence, either actually or in contemplation of law, at the time the contract was made. "Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually, or in contemplation of law, as in the case of the assignees of bankrupts, and administrators, whose title, for the protection of the estate, vests by relation."<sup>24</sup> This rule has been applied to contracts made by promoters of corporations on behalf of the corporation before its formation. It has been very generally held that the corporation could not become liable by mere ratification.<sup>25</sup> The principal need not have been in actual existence, but may have existed in contemplation of law only. A person, for instance, may contract on behalf of the estate of a deceased person or of a bankrupt, and the administrators or trustees in bankruptcy may ratify and adopt the contract, though they were not appointed, or even ascertained, at the time it was made.<sup>26</sup>

(4) The fourth rule is that the agent must have contracted for such things as the principal had the legal capacity to do,<sup>27</sup> and

<sup>23</sup> *Wilson v. Tumman*, 6 Man. & G. 236.

<sup>24</sup> *Kelner v. Baxter*, L. R. 2 Q. B. 175.

<sup>25</sup> *Kelner v. Baxter*, *supra*; *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. Rep. 907; *In re Empress Engineering Co.*, 16 Ch. Div. 125. But see *Bell's Gap R. Co. v. Christy*, 79 Pa. St. 54; *Bommer v. Spiral Co.*, 81 N. Y. 468. Where the corporation has been formed when its agents enter into a contract, the fact that it has not filed its articles of incorporation, as required by statute to entitle it to do business, does not prevent it from ratifying the contract after filing its articles. *Whitney v. Wyman*, 101 U. S. 392. And where the corporation, after it is formed, receives and enjoys the consideration, it may become liable as on an implied contract. *Bommer v. Manuf'g Co.*, 81 N. Y. 468; *Wood v. Whilen*, 93 Ill. 153; *McArthur v. Printing Co.*, 48 Minn. 319, 51 N. W. Rep. 216; *Reichwald v. Hotel Co.*, 106 Ill. 439.

<sup>26</sup> *Kelner v. Baxter*, *supra*; *Foster v. Bates*, 12 Mees. & W. 226.

<sup>27</sup> *Armitage v. Widoe*, 36 Mich. 124; *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. Rep. 27; *O'Connor v. Arnold*, 53 Ind. 203; *Davis v. Lane*, 10 N. H. 156; *Harrison v. McHenry*, 9 Ga. 164.

might lawfully do.<sup>28</sup> There can be no ratification of a void act. And so, if an agent enters into a contract on behalf of a principal who is incapable of making it, or if he enters into an illegal contract, no ratification is possible. The transaction is void,—in the one case because of the principal's incapacity, and in the other because of the illegality of the act. An infant, for instance, cannot, as a rule, empower an agent or attorney to act for him, and therefore he cannot ratify what another has assumed to do in his name as an agent or attorney. He cannot affirm what he could not authorize.<sup>29</sup>

(5) A person in ratifying a contract thus made by another on his behalf, but without authority, may, as in the acceptance of any other simple contract, signify his assent by words or by conduct. He may expressly declare his responsibility for the act of his agent,<sup>30</sup> or he may accept the benefit of it, and thereby impliedly assent,<sup>31</sup> or may otherwise impliedly assent by acquiescence in what has been

<sup>28</sup> *McCracken v. City of San Francisco*, 16 Cal. 591; *State v. Matthias*, 1 Hill (S. C.) 37; *Harrison v. McHenry*, 9 Ga. 164; *Turner v. Insurance Co.*, 55 Mich. 237, 21 N. W. Rep. 326. "On this last ground it has been said that a forged signature cannot be ratified; but it would seem that ratification is not here in question, for one who forges the signature of another does not possess the authority of an agent, actually or in contemplation. The forger does not act for another; he personates the man whose signature he forges." *Anson*, Cont. 337. To the effect that a forged signature can be ratified, see *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Forsyth v. Day*, 46 Me. 176; *Hefner v. Vandolah*, 62 Ill. 483. For a collection of the cases pro and con, see *Henry v. Heeb*, 114 Ind. 275, 16 N. E. Rep. 606.

<sup>29</sup> *Armitage v. Widoe*, 36 Mich. 124; *Trueblood v. Trueblood*, 8 Ind. 196; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631.

<sup>30</sup> *Bigelow v. Denison*, 23 Vt. 564.

<sup>31</sup> *Coykendall v. Constable*, 99 N. Y. 309, 1 N. E. Rep. 309; *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. Rep. 891; *Conant v. Canal Co.*, 29 Vt. 263; *Windham Prov. Inst. v. Sprague*, 43 Vt. 502; *Smith v. Pinney*, 32 Vt. 282; *Miles v. Ogden*, 54 Wis. 573, 12 N. W. Rep. 81; *McArthur v. Association*, 73 Iowa, 336, 35 N. W. Rep. 430; *Hall v. White*, 123 Pa. St. 95, 16 Atl. Rep. 521; *Eikenberry v. Edwards*, 67 Iowa, 14, 24 N. W. Rep. 570; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. Rep. 278; *Logan Co. Nat. Bank v. Townsend* (Ky.) 3 S. W. Rep. 122; *Murray v. Mayo*, 157 Mass. 248, 31 N. E. Rep. 1063; *United States Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. Rep. 88; *Taylor v. Conner*, 41 Miss. 722; *American Button-Hole, Overseaming & Sewing Mach.*

done.<sup>22</sup> A ratification, to be effectual, must be with a full knowledge, actual or constructive, of all the material facts.<sup>23</sup> Where

*Co. v. Maurer* (Pa. Sup.) 10 Atl. Rep. 762; *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. Rep. 188; *McDowell v. Simpson*, 3 Watts (Pa.) 129; *Gulick v. Grover*, 33 N. J. Law, 463.

<sup>22</sup> *Alexander v. Jones*, 64 Iowa, 207, 19 N. W. Rep. 913; *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. Rep. 650; *Sheldon Hat-Blocking Co. v. Eickemeyer Hat-Blocking Mach. Co.*, 90 N. Y. 610; *Cairnes v. Bleeker*, 12 Johns. (N. Y.) 300; *Pope v. Henry*, 24 Vt. 560; *Hawkins v. Lange*, 22 Minn. 557; *Lathrop v. Bank*, 8 Dana (Ky.) 114; *Cooper v. Schwartz*, 40 Wis. 54; *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. Rep. 716; *Burke v. Railway Co.*, 83 Wis. 410, 53 N. W. Rep. 692; *Reese v. Medlock*, 27 Tex. 120; *Lee v. Fontaine*, 10 Ala. 755.

<sup>23</sup> *Combs v. Scott*, 12 Allen (Mass.) 493; *Saville, Simes & Co. v. Welch*, 58 Vt. 683, 5 Atl. Rep. 491; *Wheeler v. Sleigh Co.*, 39 Fed. Rep. 347; *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. Rep. 323; *King v. Mackellar*, 109 N. Y. 215, 16 N. E. Rep. 201; *Smith v. Kidd*, 68 N. Y. 130; *Billings v. Morrow*, 7 Cal. 171; *Jackson v. Badger*, 35 Minn. 52, 26 N. W. Rep. 908; *Tallaferra v. Bank*, 71 Md. 200, 17 Atl. Rep. 1036; *Condit v. Baldwin*, 21 N. Y. 219; *McClelland v. Whiteley*, 15 Fed. Rep. 322; *Fuller v. Ellis*, 39 Vt. 345; *Vermont State Baptist Convention v. Ladd*, 58 Vt. 9, 4 Atl. Rep. 635; *Stout v. McLachlin*, 38 Kan. 120, 15 Pac. Rep. 902; *Kelley v. Railroad Co.*, 141 Mass. 496, 6 N. E. Rep. 745; *Hovey v. Brown*, 59 N. H. 114; *Herring v. Scaggs*, 73 Ala. 446; *Spooner v. Thompson*, 48 Vt. 259; *Dean v. Bassett*, 57 Cal. 640; *Merrick Thread Co. v. Philadelphia Shoe Manuf'g Co.*, 115 Pa. St. 314, 8 Atl. Rep. 794; *Ladd v. Hildebrand*, 27 Wis. 135; *Woodruff v. Railroad Co.*, 108 N. Y. 39, 14 N. E. Rep. 832; *Manning v. Gasharie*, 27 Ind. 399; *Gulick v. Grover*, 33 N. J. Law, 463; *Eggleston v. Mason* (Iowa) 51 N. W. Rep. 1; *Shoninger v. Peabody*, 59 Conn. 588, 22 Atl. Rep. 437; *Vincent v. Rather*, 31 Tex. 77. "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. \* \* \* We do not mean to say that a person can be willfully ignorant, or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them." *Combs*

conduct is relied upon as constituting ratification, the relations of the parties and their ordinary course of dealing may be of weight.

As we have seen, a contract under seal cannot be entered into by an agent unless his authority is under seal; and so, where a person has assumed to enter into a contract under seal for another without authority, the latter cannot ratify it by parol. He may probably, by recognizing and carrying it into effect, make it binding upon him as a parol contract, but he cannot, by parol ratification, make it his deed.<sup>34</sup> Where appointment of an agent to make a particular contract is required by statute to be in writing, such a contract entered into without authority cannot be ratified without writing.<sup>35</sup> "If sealed authority was indispensable, sealed ratification must be shown; and, if written authority was required, written ratification must appear."<sup>36</sup> If parol authority is sufficient, ratification may be by parol.<sup>37</sup>

(6) If the principal elects to ratify the unauthorized contract of his agent, he must ratify it as the agent made it. No rule is better settled than the rule that he cannot ratify a part of the contract and repudiate the rest. If he ratifies a part, he ratifies the whole.<sup>38</sup>

*v. Scott, supra.* Mistake of law—as to the legal effect of the contract, for instance—does not render a ratification ineffectual. *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. Rep. 891; *Kelley v. Railroad Co.*, 141 Mass. 496, 6 N. E. Rep. 745; *Craighead v. Peterson*, 72 N. Y. 279.

<sup>34</sup> *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Heath v. Nutter*, 50 Ma. 378; *Blood v. Goodrich*, 12 Wend. (N. Y.) 525; *Hunter v. Parker*, 7 Mees. & W. 343; *Boyd v. Dobson*, 5 Humph. (Tenn.) 37; *Pollard v. Gibbs*, 55 Ga. 45; *McCalla v. Mortgage Co.*, 90 Ga. 113, 15 S. E. Rep. 687; *Stetson v. Patten*, 2 Greenl. (Me.) 358; *Spofford v. Hobbs*, 29 Me. 148; *Reese v. Medlock*, 27 Tex. 120. Contra (parol ratification sufficient), *McIntyre v. Park*, 11 Gray (Mass.) 102. That parol ratification by a partner is good, see *Drumright v. Philpot*, 11 Ga. 424.

<sup>35</sup> *Hawkins v. McGroarty*, 110 Mo. 546, 19 S. W. Rep. 830; *Palmer v. Williams*, 24 Mich. 328; *Ragan v. Chenault*, 78 Ky. 546.

<sup>36</sup> *Mechem, Ag.* § 136.

<sup>37</sup> *Goss v. Stevens*, 32 Minn. 472, 21 N. W. Rep. 549; *Newton v. Bronson*, 13 N. Y. 587.

<sup>38</sup> *Eberts v. Selover*, 44 Mich. 519, 7 N. W. Rep. 225; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. Rep. 583; *Brigham v. Palmer*, 3 Allen (Mass.) 450; *Wheeler & Wilson Manufg Co. v. Aughey*, 144 Pa. St. 398, 22 Atl. Rep. 667; *Taylor v.*

**EFFECT OF THE RELATION.**

Having considered the various modes in which the relation of principal and agent may be created, we must now deal shortly with the effects of that relation. In doing so we will consider (1) the rights and liabilities of the principal and agent *inter se*; (2) the rights and liabilities of the parties where an agent contracts as agent for a named principal; and (3) the rights and liabilities of the parties where an agent contracts for a principal whose name or whose existence he does not disclose.

**SAME—RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT INTER SE.****304. The duties of the principal are:**

- (a) To pay the agent the commission or reward agreed upon.
- (b) To indemnify the agent for acts lawfully done in the execution of his authority.

**305. The duties of the agent are:**

- (a) To account to the principal for the property of the latter which comes into his hands in the course of the employment.
- (b) To obey instructions, to use ordinary diligence in the discharge of his duties, to employ any special skill or capacity which he may profess for the work in hand, and to notify his employer of circumstances which he ought to know.
- (c) To make no profit other than the commission or reward promised, either—
  - (1) By taking reward from others, or

*Conner*, 41 Miss. 722; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. Rep. 278; *Esterly Harvesting Mach. Co. v. Frolkey*, 34 Neb. 110, 51 N. W. Rep. 594; *Walker v. Haggerty*, 30 Neb. 120, 46 N. W. Rep. 221; *Daniels v. Brodie*, 54 Ark. 216, 15 S. W. Rep. 467; *Rudasill v. Falls*, 92 N. C. 222.

**(2) By becoming principal as against his employer.**

**(d) As a rule, an agent cannot delegate his powers.**

The relations of principal and agent inter se are made up of the ordinary relations of employer and employed, and of those which spring from the special business of an agent to bring two parties together for the purpose of making a contract,—to establish privity of contract between his employer and third parties.

*Duties of Principal.*

The duties of the principal are plain. In the first place, he is bound to pay the agent such commission or reward for the employment as may have been agreed upon between them, provided the agent has not, by his conduct, forfeited the right to compensation. If the agent is guilty of fraud or breach of his duty, he may forfeit his right in this respect; just as the breach of any other contract by one of the parties may discharge the other.<sup>39</sup>

The principal is further bound to indemnify the agent for acts lawfully done in the execution of his authority.<sup>40</sup> The acts, however, must be lawfully done, at least in so far as the agent is concerned; for, as we have already seen, a promise of indemnity for unlawful acts is illegal, and will not support an assumpsit.<sup>41</sup>

<sup>39</sup> *Vennum v. Gregory*, 21 Iowa, 326; *Shaeffer v. Blair*, 149 U. S. 248, 13 Sup. Ct. Rep. 856; *Sea v. Carpenter*, 16 Ohio, 412; *Jansen v. Williams* (Neb.) 55 N. W. Rep. 279. As to lien of agent for compensation, see *Muller v. Pondir*, 55 N. Y. 325; *McKenzie v. Nevins*, 22 Me. 138; *Farrington v. Meek*, 30 Mo. 578; *Vinton v. Baldwin*, 95 Ind. 433.

<sup>40</sup> *D'Arcy v. Lyle*, 5 Bin. (Pa.) 441; *Howe v. Railroad Co.*, 37 N. Y. 297; *Chamberlain v. Beller*, 18 N. Y. 115; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. Rep. 950; *Ruffner v. Hewitt*, 7 W. Va. 585; *Grace v. Mitchell*, 31 Wis. 533; *Maitland v. Martin*, 86 Pa. St. 120.

<sup>41</sup> *Coventry v. Barton*, 17 Johns. (N. Y.) 142. If one request or direct another to do an act which the latter knows at the time will be a trespass, and promise to indemnify him, the promise is void; but if the party who does the act at the instance or by the command of another does not know at the time that he is committing a trespass, and is not charged by law with knowledge, the promise to indemnify is valid. *Coventry v. Barton*, *supra*; *Moore v. Appleton*, 26 Ala. 633; *Drummond v. Humphreys*, 39 Me. 347; *Gower v. Emery*, 18 Me. 79.

*Duties of the Agent.*

The agent is bound, like every person who enters into a contract of employment, to account for the property of his employer which comes into his hands in the course of the employment. The law implies a promise to account within a reasonable time and without demand, and for a breach thereof an action of assumpsit will lie.<sup>42</sup> This does not apply, so as to dispense with the necessity for demand, where the agent has faithfully performed his duty by giving his principal timely notice that he has received money or other property on his account.<sup>44</sup>

It is also the duty of the agent to obey instructions, to use ordinary diligence in the discharge of his duties, to display any special skill or capacity which he may have professed for the work in hand, and to give his principal timely notice of every fact or circumstance which may make it necessary for him to take measures for his security. A breach of this duty is a breach of contract, for which the agent is liable to the principal in damages.<sup>44</sup>

An agent is bound not to make any profit out of transactions into which he may enter on behalf of his principal in the course of the employment, other than the reward or commission agreed upon between them. A breach of this duty may take place (1) by his accepting a reward from the other party to the transaction into which he enters; or (2) by departing from his character as agent, and assuming that of principal,—becoming, for instance, the buyer of that which he is employed to sell, or the seller of that which he is employed to buy. The first transaction is obviously fraudulent, for the agent is virtually bribed to make a bad bargain for his

<sup>42</sup> *Clark v. Moody*, 17 Mass. 145; *Lillie v. Hoyt*, 5 Hill (N. Y.) 395; *Wiley v. Logan*, 96 N. C. 510, 2 S. E. Rep. 598; *Collins v. Tilton*, 26 Conn. 368; *Placer Co. v. Astin*, 8 Cal. 303.

<sup>43</sup> *Jett v. Hempstead*, 25 Ark. 462.

<sup>44</sup> *Bell v. Cunningham*, 8 Pet. 69; *Whitney v. Express Co.*, 104 Mass. 152; *Scott v. Rogers*, 81 N. Y. 676; *Page v. Wells*, 37 Mich. 415; *Passano v. Acosta*, 4 La. Ann. 26; *Sawyer v. Mayhew*, 51 Me. 398; *Laverty v. Suethen*, 68 N. Y. 522; *Devall v. Burbridge*, 4 Watts & S. (Pa.) 306; *Babcock v. Orbison*, 25 Ind. 75; *Hall v. Railroad Co.*, 15 Ind. 362; *Morrison v. Orr*, 3 Stew. & P. (Ala.) 49; *Geisse v. Franklin*, 56 Conn. 83, 13 Atl. Rep. 148; *Redfield v. Davis*, 6 Conn. 438; *Bowerman v. Rogers*, 125 U. S. 585, 8 Sup. Ct. Rep. 986; *Clark v. Bank*, 17 Pa. St. 322.



principal; but the other is not necessarily so. In both, however, the agent acquires an interest adverse to that of his employer, and this will never be permitted, for it tends to fraud and breach of trust.\*

Where an agent, therefore, is promised a reward by the other party to the transaction in which he is engaged for his principal, or otherwise makes a bargain which might induce him to act disloyally to his principal, he cannot recover the money promised him.<sup>45</sup> The promise is illegal and void. It is immaterial in such a case that the principal was not actually injured, for the tendency of the contract renders it corrupt and unenforceable. Further than this, the agent, if he is paid the money thus promised him, or otherwise obtains a profit by a transaction of this nature, is bound to account for it to his employer; or, if there is no account remaining to be taken and adjusted between him and his employer, he is bound to pay over the amount as money absolutely belonging to his employer.<sup>46</sup>

The courts are strict in holding that an agent cannot depart from his character as agent, and become principal party to the transaction, even though his change of attitude does not result in injury to his principal.<sup>47</sup> If, for instance, a person is employed to buy or sell, he cannot buy from, or sell to, himself.<sup>48</sup> Nor, if he is em-

\* Ante, p. 441.

<sup>45</sup> *Harrington v. Dock Co.*, 3 Q. B. Div. 548; *Rice v. Wood*, 113 Mass. 133; *Atlee v. Fink*, 75 Mo. 100.

<sup>46</sup> *Morison v. Thompson*, L. R. 9 Q. B. 480; *Rice v. Wood*, supra; *Smits v. Leopold*, 51 Minn. 435, 53 N. W. Rep. 719.

<sup>47</sup> *People v. Township Board of Overyssel*, 11 Mich. 222; *Davis v. Hamlin*, 106 Ill. 39. And see the cases hereafter cited.

<sup>48</sup> *Bain v. Brown*, 56 N. Y. 285; *Taussig v. Hart*, 58 N. Y. 425; *Conkey v. Bond*, 36 N. Y. 427; *Ellsworth v. Cordrey*, 63 Iowa, 675, 16 N. W. Rep. 211; *Dwight v. Blackmar*, 2 Mich. 330; *Gardner v. Ogden*, 21 N. Y. 327; *Greenfield Bank v. Simons*, 133 Mass. 415; *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Florance v. Adams*, 2 Rob. (La.) 556; *Keighler v. Manuf'g Co.*, 12 Md. 383; *Jansen v. Williams* (Neb.) 55 N. W. Rep. 279; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Tewksbury v. Spruance*, 75 Ill. 187; *Cottom v. Holliday*, 59 Ill. 176; *Collins v. Rainey*, 42 Ark. 531; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. Rep. 203; *Harrison v. McHenry*, 9 Ga. 164; *Ames v. Log*, etc., Co., 11 Mich. 139; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. Rep. 262; *Mosely v. Buck*, 3 Munf. (Va.) 232; *Kerfoot v. Wyman*, 52 Ill. 512.

ployed to bring his principal into contractual relations with others in any way, can he assume the position of the other contracting party.<sup>49</sup> This rule arises from the fiduciary relation of principal and agent. The agent is bound to do the best he can for his principal, and, if he thus assumes a position in direct antagonism to his duty, it is difficult to suppose that the special knowledge on the strength of which he was employed is not exercised to the disadvantage of his principal. Not only, therefore, can he not assume such an antagonistic position directly, but he cannot do so indirectly. If an agent employed to effect a sale of property purchase it nominally for another, but really for himself, the purchase cannot be enforced.<sup>50</sup> In no case is it any answer to say that everything was fair, and that the principal was not prejudiced. It is enough that the agent's interest was adverse to that of his principal. "The law does not stop," it has been said in reference to an agent's purchase for himself, "to speculate upon the probabilities that the agent has resisted temptation; it removes the temptation by proclaiming in advance that he shall not acquire the property."<sup>51</sup>

As a rule, an agent cannot delegate his authority,—that is, he cannot depute to another to do that which he has undertaken to do;<sup>52</sup> but the rule is subject to limitations. "As a general rule,

<sup>49</sup> *McPherson v. Watt*, 3 App. Cas. 254; *Moore v. Mandelbaur*, 8 Mich. 433; *Merryman v. David*, 31 Ill. 404; *People v. Township Board of Overysse*, 11 Mich. 222; *Segar v. Edwards*, 11 Leigh (Va.) 213; *Stewart v. Mather*, 32 Wis. 344; *Grumley v. Webb*, 44 Mo. 444; *Butcher v. Krauth*, 14 Bush (Ky.) 713; *McKinley v. Irvine*, 13 Ala. 681.

<sup>50</sup> *McPherson v. Watt*, 3 App. Cas. 254.

<sup>51</sup> *Moore v. Moore*, 5 N. Y. 256; *People v. Township Board of Overysse*, 11 Mich. 222; *Rockford Watch Co. v. Manifold* (Neb.) 55 N. W. Rep. 236; *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. Rep. 246.

<sup>52</sup> "The rule of law is well settled that in the absence of any authority, either express or implied, to employ a subagent, the trust committed to an agent is exclusively personal, and cannot be delegated by him to another, so as to affect the rights of the principal. In such case, if the agent employs a substitute, he does it at his own risk and upon his own responsibility. The agent only is liable to the principal, and the subagent is responsible solely to his immediate employer; nor can the principal be liable for the acts of the subagent. There is no privity between them upon which any mutual rights and remedies can be based." *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518.

no doubt, the maxim, 'Delegatus non potest delegare,' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analyzed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfill, and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract."<sup>33</sup> As pointed out, however, in the case from which we have quoted, there are occasions when such authority must needs be implied,—occasions springing from the conduct of the parties, the usage of a trade, the nature of a business, or an unforeseen emergency; and "when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."<sup>34</sup> But where there is no such implied authority, and the agent employs a subagent for his own convenience, no privity of contract arises between the principal and the subagent. In the absence of special circumstances giving rise to implied authority, an agent can never delegate any portion of his power requiring the exercise of discretion or judgment, so as to render the acts of his delegate binding on the principal;<sup>35</sup> but he may delegate such powers and duties as

<sup>33</sup> *De Bussche v. Alt*, 8 Ch. Div. 310.

<sup>34</sup> *De Bussche v. Alt*, *supra*; *Appleton Bank v. McGilvray*, *supra*; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Johnson v. Cunningham*, 1 Ala. 249; *McCants v. Wells*, 4 S. C. 381.

<sup>35</sup> *Warner v. Martin*, 11 How. 223; *Hunt v. Douglass*, 22 Vt. 128; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; *Birdsall v. Clark*, 73 N. Y. 73; *Exchange Nat. Bank v. Bank*, 112 U. S. 276, 5 Sup. Ct. Rep. 141; *Emerson v. Manuf'g Co.*, 12 Mass. 237; *Cummins v. Heald*, 24 Kan. 600; *O'Conner v. Arnold*, 53 Ind. 203; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. Rep. 364; *Hoag v. Graves*, 81 Mich. 628, 46 N. W. Rep. 109; *Bocock v. Pavey*, 8 Ohio St. 270; *Bennitt v. The Guiding Star*, 53 Fed. Rep. 936; *Loeb v. Drakeford*, 75 Ala. 464; *Sayre v. Nichols*, 7 Cal. 535; *Loomis v. Simpson*, 18 Iowa, 532.

are merely ministerial or mechanical in their nature.<sup>56</sup> If an agent, for instance, is empowered to bind his principal by an accommodation acceptance, he cannot delegate to another the power to determine the propriety of the acceptance, but, having determined this question himself, he may empower another to write the acceptance, and it will bind the principal, though naming the delegate, and not the agent, as the one exercising the power.<sup>57</sup>

**SAME—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—  
NAMED PRINCIPAL.**

**306.** Where an agent contracts as agent for a principal who is named,

- (a) The party with whom the contract is made is liable to the principal directly.
- (b) The principal is liable directly to the party with whom the contract is made—
  - (1) If the agent acted within the scope of his actual authority.
  - (2) If the agent acted within an apparent authority with which he was clothed by the principal, though contrary to private instructions and limitations not known to the other party.
- (c) The agent cannot sue in his own name on the contract except—
  - (1) Where he is the real principal, though named as agent.
  - (2) Where he has a special interest in the subject-matter of the contract.
- (d) The agent cannot be sued on the contract except—
  - (1) Where the contract is under seal, and he has made himself a party to it.

<sup>56</sup> *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501; *Bodine v. Insurance Co.*, 51 N. Y. 123; *Grady v. Insurance Co.*, 60 Mo. 116; *Harralson v. Stein*, 50 Ala. 247; *Eldridge v. Holway*, 18 Ill. 445; *Williams v. Woods*, 16 Md. 220.

<sup>57</sup> *Commercial Bank v. Norton*, *supra*.

- (2) In some jurisdictions, where he contracted for a foreign principal.
- (3) Where he has exceeded his authority, or has contracted without any authority at all, he is liable in tort. In some jurisdictions he is liable *ex contractu* on an implied warranty of authority.
- (4) Where the contract was really made with him personally, though he is described as agent.

Where an agent, duly authorized, contracts as agent for a named principal, or, in other words, where the other party to the contract looks through the agent to a principal who is disclosed, the agent drops out of the transaction, if he keeps within his authority, as soon as the contract is made. The principal, and he alone, becomes directly liable to the other party, and the latter becomes directly liable to the principal, and to him alone.<sup>66</sup> Where the transaction takes this form, only two matters arise for discussion: (1) The nature and extent of the agent's authority; and (2) the rights of the parties where an agent exceeds his authority.

"Much trouble has been taken to distinguish general from special agents, as having two sorts of authority, different in kind from one another; but one may safely say that such a difference is one of degree only."<sup>67</sup> Whether the authority was general or special can make no difference except in determining whether the agent exceeded his authority. If the contract into which he has entered was within or without his authority, the effect is the same in either case.<sup>68</sup> If a person employs another specially to buy a horse for him, or to

<sup>66</sup> *Hall v. Huntoon*, 17 Vt. 244; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Woodbridge v. Hall*, 47 N. J. Law, 388; *Ogden v. Raymond*, 22 Conn. 379; *Seery v. Socks*, 29 Ill. 313; *Michael v. Jones*, 84 Mo. 578; and cases hereafter cited.

<sup>67</sup> *Anson*, Cont. 344.

<sup>68</sup> *Butler v. Maples*, 9 Wall. 766; *Huntley v. Mathias*, 90 N. C. 101; *Benjamin v. Benjamin*, 15 Conn. 347; *Hatch v. Taylor*, 10 N. H. 538; *Bryant v. Moore*, 26 Me. 84; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. Rep. 190; *London Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498; *Piercy v. Hedrick*, 2 W. Va. 458.

do any other single piece of business, the latter has authority to do whatever is necessary to accomplish that object; but he cannot bind his principal by a contract foreign to the particular object.<sup>61</sup> If a person employs another generally to manage and conduct his business, the latter may bind his principal by any contracts necessary or proper in the conduct of that business, but he cannot bind him by contracts foreign to the business.<sup>62</sup> These cases differ in nothing but the extent of the authority given. The extent of the authority is determined in both cases according to the general rule that the scope of an agent's authority is to be measured by the nature and necessities of the thing to be accomplished. There is no difference in kind between the cases. In neither of them does the agent incur any personal liability to any one with whom he contracts, so long as he contracts as agent, names his principal, and keeps within the limits of his authority.

The acts of a general agent, known as such, govern his principal in all matters coming within the proper and legitimate scope of the business to be transacted, although he violates by these acts his private instructions; for his authority cannot be limited by any private instructions, unless known to the person dealing with him.<sup>63</sup>

<sup>61</sup> *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; *Law v. Stokes*, 32 N. J. Law, 249; *Moore v. Lockett*, 2 Bibb (Ky.) 67; *London Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498; *Huber v. Zimmerman*, 21 Ala. 488; *Goodloe v. Godley*, 13 Smedes & M. (Miss.) 233; *Reitz v. Martin*, 12 Ind. 306; *Thompson v. Stewart*, 3 Conn. 171; *Towle v. Leavitt*, 23 N. H. 360; *Paige v. Stone*, 10 Metc. (Mass.) 100; *Baring v. Pierce*, 5 Watts & S. (Pa.) 548; *Brown v. Johnson*, 12 Smedes & M. (Miss.) 398; *Wood v. Goodridge*, 6 Cush. (Mass.) 117; *Pursley v. Morrison*, 7 Ind. 356; *Grudo v. Anderson*, 10 Mich. 357.

<sup>62</sup> *Notes* 63, 65, 66, *infra*; *Wood v. McCain*, 7 Ala. 800; *Trout v. Emmons*, 29 Ill. 433; *Cooley v. Willard*, 34 Ill. 68; *Brockway v. Mullin*, 46 N. J. Law, 448; *Despatch Line v. Bellamy Co.*, 12 N. H. 205.

<sup>63</sup> *Wheeler v. McGuire*, 86 Ala. 398, 5 South. Rep. 190; *Whitehead v. Tuckett*, 15 East, 400; *Hatch v. Taylor*, 10 N. H. 538; *Hubbard v. Ten Brook*, 124 Pa. St. 291, 16 Atl. Rep. 817; *London Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498; *Lightbody v. Insurance Co.*, 23 Wend. (N. Y.) 18; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; *Lobdell v. Baker*, 1 Metc. (Mass.) 193; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; *Walker v. Skipwith*, Meigs (Tenn.) 502; *Williams v. Getty*, 31 Pa. St.

If the agency is special, and is known, it is the duty of the person dealing with the agent to inquire into the nature and extent of the authority conferred, and to deal with the agent accordingly.<sup>64</sup> Where the special character of the agency is not known, and the principal has clothed the agent with apparent powers, strangers, in dealing with the agent, may assume that such apparent powers are possessed. The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume.<sup>65</sup> "There are two cases in which a principal becomes liable for the acts of his agent,—one, where the agent acts within the limits of his authority; the other, where he transgresses the actual limits, but acts within the apparent limits, of his authority, where those apparent limits have been sanctioned by the principal."<sup>66</sup> This is what we have already spoken of as "agency by estoppel."

401; *Lister v. Allen*, 31 Md. 543; *Sails v. Miller*, 98 Mo. 478, 11 S. W. Rep. 970; *Topham v. Roche*, 2 Hill (S. C.) 307; *Hubbard v. Ten Brook*, 124 Pa. St. 291, 16 Atl. Rep. 817; *Banks v. Everest*, 35 Kan. 687, 12 Pac. Rep. 141.

<sup>64</sup> *Hatch v. Taylor*, 10 N. H. 538; *Snow v. Perry*, 9 Pick. (Mass.) 539; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; *Towle v. Leavitt*, 23 N. H. 360; *Bryant v. Moore*, 26 Me. 84; *Ruppe v. Edwards*, 52 Mich. 411, 18 N. W. Rep. 193; *Dowden v. Cryder* (N. J. Err. & App.) 26 Atl. Rep. 941; *Bohart v. Oberne*, 36 Kan. 284, 13 Pac. Rep. 388; *Stovall v. Com.*, 84 Va. 246, 4 S. E. Rep. 379; *Yates v. Yates*, 24 Fla. 64, 3 South. Rep. 821.

<sup>65</sup> *Hamill v. Ashley*, 11 Colo. 180, 17 Pac. Rep. 502; *Jackson v. Emmens*, 119 Pa. St. 356, 13 Atl. Rep. 210; *Shaw v. Williams*, 100 N. C. 272, 6 S. E. Rep. 196; *Howell v. Graff*, 25 Neb. 130, 41 N. W. Rep. 142; *Hayner v. Church-ill*, 29 Mo. App. 676. And see cases in the following note, and in notes 62, 63, *supra*.

<sup>66</sup> *Maddick v. Marshall*, 16 C. B. (N. S.) 393; *Law v. Stokes*, 32 N. J. Law, 249; *Lister v. Allen*, 31 Md. 543; *Bryant v. Moore*, 26 Me. 84; *Williams v. Mitchell*, 17 Mass. 98; *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. Rep. 864; *Talmage v. Bierhouse*, 103 Ind. 270, 2 N. E. Rep. 716; *Hatch v. Taylor*, 10 N. H. 538; *Gallinger v. Traffic Co.*, 67 Wis. 529, 30 N. W. Rep. 790; *Aldrich v. Wilmarth* (S. D.) 54 N. W. Rep. 811; *Palmer v. Roath*, 86 Mich. 602, 49 N. W. Rep. 590; *Williams v. Getty*, 31 Pa. St. 461; *Winchell v. Express Co.*, 64 Vt. 15, 23 Atl. Rep. 728; *Barnett v. Glutting* (Ind. App.) 29 N. E. Rep. 927; *Allis v. Voigt*, 90 Mich. 125, 51 N. W. Rep. 190; *Carmichael v. Buck*, 10 Rich. (S. C.) 332; *Ayer v. Manufacturing Co.*, 147 Mass. 46, 16 N. E. Rep. 754; *Mason v. Taylor*, 38 Minn. 32, 35 N. W. Rep. 474.

In like manner, as we have seen, an implied authority may be deduced from the nature and circumstances of the particular act done by the principal. If a principal sends his commodity, for instance, to a place where it is the ordinary business of the person to whom it is confided to sell, it will be presumed that the article is sent for the purpose of sale; and where an article is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound by a sale by his agent, though the latter, unknown to the purchaser, may have exceeded his actual authority.<sup>67</sup>

It may be well for us to note shortly the amount of authority with which certain kinds of agents are invested in the ordinary course of their employment.

An auctioneer is an agent to sell goods at a public auction. He is primarily an agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer; and he is so, as we have seen, for the purpose of the signatures of both parties, to satisfy the statute of frauds. He has not merely an authority to sell, but actual possession of, the goods, and a lien upon them for his charges. He may sue the purchaser in his own name,<sup>68</sup> and even where he contracts avowedly as agent, and for a known principal, he may introduce terms into the contract which he makes with the buyer, so as to render himself personally liable.<sup>69</sup>

A factor, by the rules of common law and of mercantile usage, is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer.<sup>70</sup> He further has a lien upon the

<sup>67</sup> Ante, p. 717; *Towle v. Leavitt*, 23 N. H. 373; *Pickering v. Busk*, 15 East, 38; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Sandford v. Handy*, 23 Wend. (N. Y.) 260.

<sup>68</sup> *Hulse v. Young*, 16 Johns. (N. Y.) 1; *Minturn v. Main*, 7 N. Y. 220; *Beller v. Block*, 19 Ark. 506; *Walker v. Herring*, 21 Grat. (Va.) 678; *M'Comb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Brent v. Green*, 6 Leigh. (Va.) 16.

<sup>69</sup> *Wolfe v. Horne*, 2 Q. B. Div. 355.

<sup>70</sup> *Dwight v. Whitney*, 15 Pick. (Mass.) 179; *Slack v. Tucker*, 23 Wall. 321; *Hutchinson v. Bowers*, 6 Cal. 383; *James v. M'Credie*, 1 Bay (S. O.) 267.



goods for the balance of account as between himself and his principal, provided he has possession of the goods, and the right of property in them is in his principal. If he voluntarily relinquishes possession, he loses his right to a lien.<sup>71</sup> He also has an insurable interest in the goods. Such is the authority of a factor at common law,—an authority which the principal cannot restrict, as against third parties, by instructions privately given to his agent. This authority has been extended by statute in some jurisdictions.

A broker is an agent primarily to establish privity of contract between two parties. Where he is a broker for sale, he has not possession of the goods, and so he has not the authority thence arising which a factor enjoys. Nor has he authority to sue in his own name on contracts made by him.

A *del credere* agent is an agent for the purpose of sale, but in addition to this he gives an undertaking to his employer that the parties with whom he is brought into contractual relations will perform the engagements into which they enter. He does not guaranty the solvency of these parties, or promise to answer for their default, but he promises to indemnify his employer against his own inadvertence or ill fortune in making contracts for him with persons who cannot or will not perform them.<sup>72</sup>

#### *Rights and Liabilities of Agent.*

As a rule, an agent cannot sue in his own name on a contract into which he has entered, as agent, for a named principal.<sup>73</sup> The

*Given v. Lemoine*, 35 Mo. 110; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69; *Pinkham v. Crocker*, 77 Me. 563, 1 Atl. Rep. 827; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *McConnico v. Holloway*, 2 Call. (Va.) 357.

<sup>71</sup> *Writer v. Colt*, 7 N. Y. 288; *Elliot v. Bradley*, 23 Vt. 217; *Vall v. Durant*, 7 Allen (Mass.) 408; *Weld v. Adams*, 37 Conn. 878; *Gibson v. Stevens*, 8 How. 384; *Grogg v. Brown*, 44 Me. 157; *Brown v. Combs*, 63 N. Y. 598; *Schiffer v. Feagin*, 51 Ala. 335; *Brown v. Wiggins*, 16 N. H. 312; *Winne v. Hammond*, 37 Ill. 99; *Eaton v. Truesdall*, 52 Ill. 307.

<sup>72</sup> *Dalton v. Goddard*, 104 Mass. 497; *Bradley v. Richardson*, 23 Vt. 720; *Swan v. Nesmith*, 7 Pick. (Mass.) 220; *Holbrook v. Wright*, 24 Wend. (N. Y.) 169; *Smock v. Brush*, 62 Ind. 156; *Lewis v. Brehme*, 33 Md. 412; *Coulurier v. Hastie*, 8 Exch. 40; *Grove v. Dubois*, 1 Term R. 112.

<sup>73</sup> *Gunn v. Cantine*, 10 Johns. (N. Y.) 387; *Gillmore v. Pope*, 5 Mass. 491; *Jones v. Hart*, 1 Hen. & M. (Va.) 470; *Garland v. Reynolds*, 20 Me. 45; *Kent*

party with whom he contracted has presumably looked to the named principal, and cannot, unless he so chooses, be made liable to one with whom he dealt merely as a means of communication. To this rule there are exceptions: (1) Where the agent is the real principal; and (2) where he has a special interest in the subject-matter of the contract. Where the agent is the real principal, and the party with whom he contracts knows of this fact, and deals with him as the real principal, he may sue on the contract in his own name, although he signed the contract as agent of a named principal.<sup>74</sup> It has also been held that an agent, such as a factor or broker, who has a special interest in the contract, as for commissions, may sue thereon in his own name.<sup>75</sup>

It is also a general rule that an agent who contracts, as agent, for a named principal, cannot be sued on the contract;<sup>76</sup> and there are very few exceptions to the rule. The first exception is in case of contracts under seal. An agent who makes himself a party to a contract under seal is bound thereby at common law, though he is described as agent.<sup>77</sup>

Another exception is where an agent contracts for a foreign principal. It is established in England, and has been held in some of our states, that an agent who contracts on behalf of a foreign principal is held, by the usage of merchants, to have no authority

*v. Bornstein*, 12 Allen (Mass.) 342. But it has been held otherwise where the contract was payable to the agent by name. *Sharp v. Jones*, 18 Ind. 314; *Doe v. Thompson*, 22 N. H. 217.

<sup>74</sup> *Raynor v. Grote*, 15 Mees. & W. 359.

<sup>75</sup> *Baltimore & P. S. Co. v. Atkins*, 22 Pa. St. 522; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Whitehead v. Potter*, 4 Ired. (N. C.) 257; *Toland v. Murray*, 18 Johns. (N. Y.) 24.

<sup>76</sup> *Jefts v. York*, 4 Cush. (Mass.) 371; *McCurdy v. Rogers*, 21 Wis. 199; *Hall v. Huntoon*, 17 Vt. 244; *Lehman v. Feld*, 37 Fed. Rep. 852; *Simonds v. Heard*, 23 Pick. (Mass.) 120; *Ogden v. Raymond*, 22 Conn. 379; *Bailey v. Cornell*, 66 Mich. 107, 33 N. W. Rep. 50.

<sup>77</sup> *Beckham v. Drake*, 9 Mees. & W. 95; *Lutz v. Linthicum*, 8 Pet. 165; *Fullam v. West Brookfield*, 9 Allen (Mass.) 1; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *White v. Skinner*, 13 Johns. (N. Y.) 307; *Hancock v. Yunker*, 83 Ill. 208; *Stone v. Wood*, 7 Cow. (N. Y.) 453; *Taft v. Brewster*, 9 Johns. (N. Y.) 334.

to pledge his principal's credit, and becomes personally liable on the contract.<sup>78</sup> In New York the contrary has been held.<sup>79</sup> Probably in no state would a sister state be regarded as a foreign country within the rule.<sup>80</sup>

An important exception to the rule is where an agent contracts without authority, or for a nonexistent or incapable principal. It is well settled that if a person contracts as agent on behalf of a principal who does not exist, or who cannot contract, or if he enters into a contract in excess of his authority, he is personally liable in some form to the other party.<sup>81</sup> Whether he is liable *ex contractu*, or whether he is only liable in tort, is an unsettled question, and there is a conflict of opinion. In England, and in some of our states, he is liable in contract if he acted in good faith, and in tort if he acted in bad faith. If he believed that he had an authority which he did not in fact possess, he may be sued upon an implied warranty of authority. This is an implied or feigned promise to the other party that, in consideration of his making the contract, the professed agent undertakes that he has authority to bind his principal.<sup>82</sup> "The unavailability of this warranty of authority makes it open to criticism, since the promise therein involved was probably never present to the minds of either of the

<sup>78</sup> *Armstrong v. Stokes*, L. R. 7 Q. B. 605; dissenting opinion in *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Rogers v. March*, 33 Me. 106; *McKenzie v. Nevins*, 22 Me. 138; *Newcastle Manuf'g Co. v. Railroad Co.*, 1 Rob. (La.) 145; *Merrick's Estate*, 5 Watts & S. (Pa.) 9.

<sup>79</sup> *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244.

<sup>80</sup> *Vawter v. Baker*, 23 Ind. 63; *Oelricks v. Ford*, 23 How. 49; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Bray v. Kettell*, 1 Allen (Mass.) 80; *Barham v. Bell*, 112 N. C. 131, 16 S. E. Rep. 903. But see *Barry v. Page*, 10 Gray (Mass.) 398.

<sup>81</sup> *Keiner v. Baxter*, L. R. 2 C. P. 175; *McCurdy v. Rogers*, 21 Wis. 199. And see the cases hereafter cited on this subject.

<sup>82</sup> *Collen v. Wright*, 8 El. & Bl. 647; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Keener v. Harrod*, 2 Md. 63; *Grafton Bank v. Flanders*, 4 N. H. 239; *Simmons v. More*, 100 N. Y. 140, 2 N. E. Rep. 640; *Baltzen v. Nicolay*, 53 N. Y. 467; *Kroeger v. Pitcairn*, 101 Pa. St. 311; *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. Rep. 110; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. Rep. 506; *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. Rep. 911; *Gillaspie v. Wesson*, 7 Port. (Ala.) 454; *Bank v. Wray*, 4 Strob. (S. C.) 87; *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70.

parties affected by it.”<sup>83</sup> Some of our courts have taken this view of the question, and have held that an agent acting without authority cannot be held liable in contract.<sup>84</sup> “If one falsely represents that he has an authority by which another, relying on the representation, is misled, he is liable; and by acting as agent for another when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized, without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort.”<sup>85</sup> If the professed agent knew that he had not the authority which he assumed to possess, he may certainly be sued by the injured party in an action for deceit.<sup>86</sup> As we have just seen, some courts hold that this is the injured party’s only remedy, even where the professed agent acted in good faith.

Contracts may be so framed as to leave it uncertain whether the agent meant to contract as agent or to make himself personally liable. In such a case the intention and understanding of the parties, as shown by the evidence of the contract, must govern. If an agent engages expressly in his own name to pay a sum of money or perform other obligations, he is personally responsible on such engagement, although he describes himself as agent, and was duly authorized to enter into such an engagement for his principal. If he uses his own name, and not the name of his principal, he is *prima facie* personally liable, and the fact that he uses the word “agent” after his name will not alter the case unless the wording of the contract shows that it was intended that the principal should be bound.<sup>87</sup>

<sup>83</sup> Anson, *Cont.* 349.

<sup>84</sup> *Bartlett v. Tucker*, 104 Mass. 336; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Jefts v. York*, 10 Cush. (Mass.) 392; *Hall v. Lauerdale*, 46 N. Y. 70; *Taylor v. Sheldon*, 30 Conn. 122; *Noyes v. Loring*, 55 Me. 408; *Simpson v. Garland*, 76 Me. 203; *Woods v. Ayres*, 39 Mich. 351.

<sup>85</sup> *Jefts v. York*, *supra*; *Harper v. Little*, 2 Greenl. (Me.) 14; *McCurdy v. Rogers*, 21 Wis. 199; *Duncan v. Niles*, 32 Ill. 532; *Stetson v. Patten*, 2 Greenl. (Me.) 358; *Ogden v. Raymond*, 22 Conn. 379; *Hall v. Crandall*, 29 Cal. 567.

<sup>86</sup> *Polhill v. Walter*, 3 Barn. & Adol. 114. Cases cited in notes 81–85, *supra*.

<sup>87</sup> *Simmonds v. Heard*, 23 Pick. (Mass.) 120; *Davis v. England*, 141 Mass.

**SAME—UNDISCLOSED PRINCIPAL—NAME UNDISCLOSED**

**307.** Where an agent enters into a contract, disclosing the existence, but not the name, of his principal,

- (a) He is not personally liable if he contracted as agent only, and the other party so understood.
- (b) If credit was given to the agent, the other party may hold him personally, or may hold the undisclosed principal, at his election.
- (c) Unless the contrary clearly appears, it will be assumed that the other party intended to accept the alternative liability of agent or principal.
- (d) In the case of negotiable instruments, an unnamed principal cannot be sued.

A man "has a right to the character, credit, and substance of the person with whom he contracts." If, therefore, he enters into a contract with an agent who does not give his principal's name, the presumption is that he is invited to give credit to the agent; still more if the agent does not disclose his principal's existence. In the last case invariably, in the former case within certain limits, the party who contracts with an agent on these terms gets an alternative liability, and may elect to sue the agent or the principal upon the contract.<sup>22</sup>

Where an agent contracts as agent, and discloses the existence of his principal, but does not disclose his name, the rights and liabilities of agent and principal, as regards the other party to the contract, must depend on the construction of its terms. If it clearly appears that the intention was to contract as agent only, and that

587, 6 N. E. Rep. 731; *Bickford v. Bank*, 42 Ill. 238; *Stone v. Wood*, 7 Cow. (N. Y.) 453; *Barker v. Insurance Co.*, 3 Wend. (N. Y.) 94; *Duvall v. Craig*, 2 Wheat. 45; *Woodbridge v. Hall*, 47 N. J. Law, 388, 1 Atl. Rep. 492; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. Rep. 123; *Bean v. Mining Co.*, 66 Cal. 451, 6 Pac. Rep. 86; *Michael v. Jones*, 84 Mo. 578; *Simpson v. Garland*, 76 Me. 203; *Bradstreet v. Baker*, 14 R. I. 540.

<sup>22</sup> *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. Rep. 24; *Merrill v. Kenyon*, 48 Conn. 314; *Appeal of National S. & L. Bank* (Conn.) 12 Atl. Rep. 646.

the other party so understood, the agent cannot be held liable.<sup>80</sup> If, on the other hand, it appears from the face of the contract, or from the conduct of the parties, that credit was given to the agent, and that the other party intended to hold him liable on the contract, he will be personally liable. And it will be assumed, in the absence of words strongly and distinctly expressive of agency, that one who deals with an agent for an unnamed principal intended to take the alternative liability of the principal or the agent.<sup>81</sup> An agent, therefore, to escape personal liability, should always either use his principal's name, or use terms that will clearly show that the contract was only intended to bind his principal.

To the rule that, where an agent contracts for an undisclosed principal, the other party is entitled to hold the principal liable, there is an exception in the case of negotiable instruments. If a person signs a negotiable note as "agent," without any words in the note to show who the principal was, he, only, is liable. The payee cannot prove who the principal was, and hold him liable.<sup>82</sup>

It has been held that where an agent has, under the circumstances above stated, contracted as agent without disclosing his principal's name, he may, as against the party with whom he contracted, repudiate the character of agent, and adopt that of principal, though the effect of this is to deprive the other party of the alternative liability of the agent or the unnamed principal.<sup>83</sup>

<sup>80</sup> *Flett v. Murton*, L. R. 7 Q. B. 126; *Southwell v. Bowditch*, 1 C. P. Div. (C. A.) 374; *Berry v. Brown*, 107 N. Y. 659, 14 N. E. Rep. 289.

<sup>81</sup> *Thompson v. Davenport*, 9 B. & C. 78; *Bell v. Teague*, 85 Ala. 211, 8 South. Rep. 861; *Wheeler v. Reed*, 36 Ill. 81; *Kean v. Davis*, 20 N. J. Law, 425; *Murphy v. Helmrich*, 66 Cal. 69, 4 Pac. Rep. 958.

<sup>82</sup> *Fuller v. Hooper*, 3 Gray (Mass.) 341; *Williams v. Robbins*, 16 Gray (Mass.) 77; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271; *De Witt v. Walton*, 9 N. Y. 571; *Tannatt v. Bank*, 1 Colo. 278; *Collins v. Insurance Co.*, 17 Ohio St. 215; *American Ins. Co. v. Stratton*, 59 Iowa, 696, 13 N. W. Rep. 763; *Sturdivant v. Hull*, 59 Me. 172.

<sup>83</sup> *Schmalz v. Avery*, 16 Q. B. 655.

**SAME—UNDISCLOSED PRINCIPAL—EXISTENCE UNDISCLOSED.**

308. Where an agent enters into a contract on behalf of his principal, without disclosing the principal's existence,

(a) The other party may, at his election, hold either the principal or the agent, except—

*Aliable* (1) Where the contract is a negotiable instrument.

*A "* (2) Where the terms of the contract are incompatible with the existence of agency.

(3) Where the other party has once made his election to hold one or the other.

*Aliable,* (4) Where the principal, while exclusive credit was given to the agent, has settled with the agent for what he has received.

(b) The principal may sue on such a contract, subject to the other party's right to set up any defense he might have used against the agent.

If the agent acts on behalf of a principal whose existence he does not disclose, the other contracting party, subject to an exception in the case of negotiable instruments,<sup>33</sup> is entitled to elect whether he will treat principal or agent as the party with whom he dealt.<sup>34</sup> The reason of this rule is that, if a person enters into a contract with another, he is entitled, at all events, to the liability of the party with whom he supposed himself to be contracting. If he subsequently discovers that such person is in fact the representative of another, he is entitled to choose whether he will accept the

<sup>33</sup> Ante, p. 741, note 91.

<sup>34</sup> Merrill v. Kenyon, 48 Conn. 314; Irvine v. Watson, 5 Q. B. Div. 414; Bacon v. Rupert, 39 Minn. 512, 40 N. W. Rep. 832; Porter v. Day, 44 Ill. App. 256; Hubbard v. Tenbrook, 124 Pa. St. 291, 16 Atl. Rep. 817; Welch v. Goodwin, 123 Mass. 71; Baldwin v. Leonard, 39 Vt. 260; Holt v. Ross, 54 N. Y. 472; Taintor v. Prendergast, 8 Hill (N. Y.) 72; Bacon v. Sondley, 3 Strob. (S. C.) 542.

actual state of things, and sue the latter as principal, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat the agent as the principal party. In such a case the other party to the contract may prove the agency for the purpose of fixing the liabilities of the contract on the principal, but the agent cannot prove the agency for the purpose of escaping liability. The real principal is entitled to sue on such a contract, but the other party may set up any defense which he might have used against the agent.<sup>95</sup>

The right of the other contracting party to avail himself of his alternative right to sue either the agent or the undisclosed principal may in various ways be so determined that he is limited to one of the two, and no longer has the choice of either liability.

(1) In the first place, the agent may contract in such terms that the agency is incompatible with the construction of the contract. Thus, where an agent, in making a charter party, described himself therein as owner of the ship, it was held that he could not be regarded as agent.<sup>96</sup>

(2) If the other party to the contract, after having discovered the existence of the undisclosed principal, does anything unequivocally indicating that he adopts either principal or agent as the party liable to him, his election is determined, and he cannot afterwards sue the other.<sup>97</sup> So, too, if, before he ascertains the fact of agency, he sues the agent and obtains judgment, he cannot afterwards recover against the principal. But the mere bringing of an action, or other recognition of the liability of one of the parties, while in ignorance of the agency, would not thus determine his

<sup>95</sup> *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Ruiz v. Norton*, 4 Cal. 355; *Parker v. Cochrane*, 11 Colo. 363, 18 Pac. Rep. 209; *Foster v. Smith*, 2 Cold. (Tenn.) 474; *Gilpin v. Howell*, 5 Pa. St. 41; *Rosser v. Darden*, 82 Ga. 219, 7 S. E. Rep. 919; *Ames v. Railroad Co.*, 12 Minn. 412 (Gil. 295); *Elkins v. Railroad Co.*, 19 N. H. 337; *Tutt v. Brown*, 5 Litt. (Ky.) 1; *Hunter v. Giddings*, 97 Mass. 41; *Winchester v. Howard*, Id. 303; *Wood v. Bank*, 129 Mass. 358; *Bernhouse v. Abbott*, 45 N. J. Law, 531.

<sup>96</sup> *Humble v. Hunter*, 12 Q. B. 810. -

<sup>97</sup> *Paterson v. Gandasequi*, 15 East, 62; *Kinsley v. Davis*, 104 Mass. 178; *Coleman v. Bank*, 53 N. Y. 388; *Cobb v. Knapp*, 71 N. Y. 348; *Schepflin v. Dessar*, 20 Mo. App. 509. Contra, *Beymer v. Bonsall*, 79 Pa. St. 298.



rights, "for it may be that an action against one might be discontinued and fresh proceedings be well taken against the other."<sup>99</sup>

(3) Again, if, while exclusive credit is given to the agent, the undisclosed principal pays the agent for the price of goods sold to him, he cannot be sued when he is discovered to be the purchaser. If a person buys goods from another on behalf of a principal whose existence he does not disclose, and the principal, before he is known to be principal, pays the price to the agent, the principal cannot be sued by the seller.<sup>100</sup> But the case is different where the existence of a principal is known, though his name is not disclosed. There the other contracting party presumably looks beyond the agent to the credit of the principal. "The essence of such a transaction is that the seller, as an ultimate resource, looks to the credit of some one to pay him if the agent does not. Till the agent fails in payment, the seller does not want to have recourse to this additional credit; it remains in the background. But if, before the time comes for payment, or before, on nonpayment by the agent, recourse can fairly be had to the principal, whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller, behind the seller's back, of his credit."<sup>100</sup>

#### SAME—FRAUD OF AGENT.

**309.** If an agent is guilty of fraud in entering into a contract on behalf of his principal,

- (a) Both he and his principal are liable if he acted within the scope of his employment.
- (b) He, but not his principal, is liable if he acted without the scope of his employment.

<sup>99</sup> *Priestly v. Fernie*, 3 Hurl. & C. 984; *Gardner v. Peaslee*, 143 Mass. 382, 9 N. E. Rep. 833; *Cobb v. Knapp*, 71 N. Y. 348; *Ferry v. Moore*, 18 Ill. App. 185; *Kinsley v. Davis*, 104 Mass. 178.

<sup>100</sup> *Armstrong v. Stokes*, L. R. 7 Q. B. 599; *Fradley v. Hyland*, 37 Fed. Rep. 49; *Clealand v. Walker*, 11 Ala. 1058; *Thomas v. Atkinson*, 38 Ind. 248.

<sup>100</sup> *Irvine v. Watson*, 5 Q. B. Div. 107 (Ct. App.) 414.

- (c) In either case, subject to the conditions mentioned in treating of fraud, the other party may avoid the contract.

The principal is liable to an action for deceit for the fraud of his agent, if the fraud was committed in the ordinary course of his employment.<sup>101</sup> The liability of the principal is in no wise different from that of an employer who is responsible for wrongful acts done by those in his service, within the scope of their employment. A man is equally liable for the negligence of his coachman, who runs over a foot passenger in driving his master's carriage from the house to the stables, and for the fraud of his agent, who, being instructed to obtain a purchaser for certain goods, obtains one by false statements as to the quality of the goods. But, if the person employed act beyond the scope of his employment, he no longer represents his employer to bind him by tort or contract.<sup>102</sup> Where an agent, for instance, was employed to sell a log of mahogany, but was not authorized to warrant its soundness, and he did so knowing it to be unsound, it was held that the employer was not liable for deceit, and, further, that the contract could not be avoided because the parties could no longer be replaced in their previous positions, for the log had been sawed up and partly used.<sup>103</sup> The rights of the parties may be stated to be as follows: If the agent commits a fraud in the course of his employment, he is liable,<sup>104</sup> and so is his principal.<sup>105</sup> If he commits a fraud outside the scope of his authority, he would be liable, but not his principal.<sup>106</sup> In either

<sup>101</sup> *Barwick v. Bank*, L. R. 2 Exch. 259; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; *Smith v. Tracy*, 86 N. Y. 79; *Locke v. Stearns*, 1 Metc. (Mass.) 560; *Wolfe v. Pugh*, 101 Ind. 293; *Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. Rep. 459; *Rhoda v. Annis*, 75 Me. 17; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. Rep. 800.

<sup>102</sup> *Udell v. Atherton*, 7 Hurl. & N. 172; *Nichols v. Bruns*, 5 Dak. 28, 37 N. W. Rep. 752.

<sup>103</sup> *Udell v. Atherton*, *supra*.

<sup>104</sup> *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508; *Clark v. Lovering*, 87 Minn. 120, 33 N. W. Rep. 776; *Hedden v. Griffin*, 136 Mass. 229; *Kroeger v. Pitcairn*, 101 Pa. St. 811.

<sup>105</sup> Note 101, *supra*.

<sup>106</sup> Notes 102, 103, *supra*.

case the other party would be entitled to avoid the contract upon the conditions described in treating of the effect of fraud.<sup>107</sup>

#### DETERMINATION OF THE RELATION.

310. The authority of an agent may be determined—

(a) By agreement; and this may be:

(1) By performance of the object of the agency.

(2) By efflux of a specified time.

(3) By revocation or renunciation in accordance with the express or implied terms of the contract.

(b) By the act of one of the parties, revoking or renouncing the agency in breach of the contract of employment. The authority is revoked, though the contract is broken.

**EXCEPTIONS**—(1) Authority cannot be revoked where it is coupled with an interest.

(2) Notice of the revocation must be given those to whom the agent has been held out.

(c) By operation of law. This results from—

(1) The destruction of the subject-matter of the agency.

(2) The bankruptcy of either party.

(3) The marriage of a feme sole principal.

(4) The insanity of either party.

(5) The death of either party.

**EXCEPTION**—An authority coupled with an interest is not revoked by operation of law in such cases.

#### *By Agreement.*

Since the relation of principal and agent is that of employer and employed (a relation founded on mutual consent), it follows that

<sup>107</sup> *Ante*, p. 348.

the relation may be brought to a close by the same process which created it,—the agreement of the parties. This may be by an agreement expressly entered into, after the creation of the agency, for the purpose of terminating it, or it may be by the fulfillment of terms expressed or implied in the contract of employment. Where, at the time the agency is created, its duration is fixed, then, in accordance with the agreement, it ceases on the efflux of the time specified.<sup>108</sup> It also necessarily ceases, where no time is specified, when the object to which the agency was expressly limited is performed.<sup>109</sup> Again, the contract of employment may contain terms allowing the agency to be terminated by one or either party on certain conditions. A revocation or renunciation in accordance with the terms of the contract is a determination of the agency by agreement.<sup>110</sup> Such terms may be expressed or implied. Where the contract is silent as to the right to revoke or renounce the authority, and there is nothing in the nature of the contract or the circumstances to show a contrary intention, the authority may be rightly revoked or renounced at any time on notice.<sup>111</sup>

*By the Act of the Parties.*

We have just seen that an agency may be revoked or renounced in accordance with express or implied terms in the contract of employment. Such a determination of the agency, though in a sense by the acts of the parties, is by agreement. The contract of employment is not broken. On the other hand, one of the parties may revoke or renounce the agency, not in accordance with the terms of the contract, but in violation of them. The agency in this case is determined by the act of the party, but it is determined contrary to agreement. The contract of employment is broken, and the other party may recover his damages for the breach, as in the case

<sup>108</sup> *Gundlach v. Fischer*, 59 Ill. 172; *Danby v. Coutts*, 20 Ch. Div. 500.

<sup>109</sup> *Benoit v. Inhabitants*, 10 Allen (Mass.) 528; *Moore v. Stone*, 40 Iowa, 259; *Short v. Millard*, 68 Ill. 292.

<sup>110</sup> *Oregon, etc., Bank v. American Mortg. Co.*, 35 Fed. Rep. 22; *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. Rep. 718.

<sup>111</sup> *Barrows v. Cushway*, 37 Mich. 481; *Kirk v. Hartman*, 63 Pa. St. 97; *Chambers v. Seay*, 73 Ala. 372; *North Carolina S. L. Ins. Co. v. Williams*, 91 N. C. 69.

of any other breach of contract.<sup>112</sup> The authority, however, subject to certain exceptions, is effectually determined.<sup>113</sup> A principal, therefore, may revoke the authority of his agent, though in doing so he violates the contract of employment; and the acts of the agent after such revocation will not bind the principal.<sup>114</sup> This power of revocation, however, is subject to the limitation already explained,—that a principal cannot, by private communications with his agent, limit or revoke an authority which he has allowed his agent to assume before the public. He will be bound by the acts of the agent which he has given other persons reason to suppose are done by his authority.<sup>115</sup> As we have already seen, a husband may, by his conduct in allowing his wife to deal on his credit, constitute her his agent to pledge his credit.<sup>116</sup> If he has allowed her to so deal with a tradesman, and has acquiesced by paying her bills, this tradesman may assume that her authority continues until he receives notice to the contrary. In the absence of such a notice, the tradesman's right to hold the husband cannot be affected by the husband's private revocation of her authority. In the absence of such authority arising from the conduct of the husband, he is entitled, as against persons dealing with the wife, to revoke

<sup>112</sup> *Howard v. Daly*, 61 N. Y. 362; *Weed v. Burt*, 78 N. Y. 192; *Lewis v. Insurance Co.*, 61 Mo. 534; *James v. Allen Co.*, 44 Ohio St. 226; *Richardson v. Machine Works*, 78 Ind. 422. As to the measure of damages, see *Mech. Ag. § 622*.

<sup>113</sup> *Mech. Ag. § 204* (and cases there cited); *Chambers v. Seay*, 73 Ala. 372; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Walker v. Denison*, 86 Ill. 142; *Attrill v. Patterson*, 58 Md. 226; *Jones v. Harris*, 59 Miss. 214.

<sup>114</sup> *Tucker v. Lawrence*, 56 Vt. 467; *Simpson v. Carson*, 11 Or. 361, 8 Pac. Rep. 325; *Darrow v. St. George*, 8 Colo. 592, 9 Pac. Rep. 791; *Providence Gas-Burner Co. v. Barney*, 14 R. I. 18; *Johnson v. Youngs*, 82 Wis. 107, 51 N. W. Rep. 1095.

<sup>115</sup> *Debenham v. Mellon*, 5 Q. B. Div. 394, 6 App. Cas. 24; *Clafin v. Lenheim*, 66 N. Y. 301; *Baudouine v. Grimes*, 64 Iowa, 370, 20 N. W. Rep. 476; *Diversy v. Kellogg*, 44 Ill. 114; *Wright v. Herrick*, 128 Mass. 240; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *Tier v. Lampson*, 35 Vt. 179; *Caper v. Insurance Co.*, 25 N. J. Law, 67; *Howe Mach. Co. v. Simler*, 59 Ind. 307; *Van Dusen v. Star Quartz Min. Co.*, 36 Cal. 571.

<sup>116</sup> *Ante*, p. 717.

any express or implied authority which he may have given her, and to do so without notice to persons so dealing. Where a wife, after being forbidden by her husband to pledge his credit, purchased goods on his credit from a tradesman who had never before so dealt with her, it was held that he could not hold the husband, though he had no notice of the latter's refusal to authorize her dealings. "The tradesman must be taken to know the law; he knows that the wife has no authority, in fact or in law, to pledge the husband's credit, even for necessities, unless he expressly or impliedly gives it to her, and that what the husband gives he may take away."<sup>117</sup>

A further limitation, in favor of the agent, of the principal's power of revocation, is that "an authority coupled with an interest is irrevocable."<sup>118</sup> By "interest," as the term is here used, is meant something more than the advantage which the agent may derive from a continuance of the authority, or the inconvenience, or even the loss, which he may suffer by its revocation. These are not such interests as will prevent a revocation by the principal. "Where an agreement," it has been said, "is entered into on a sufficient consideration, whereby an authority is given for the purpose of conferring some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest."<sup>119</sup> This, however, is too broad. "To impart an irrevocable quality to a power of attorney, in the absence of any express stipulation, and as a result of legal principles alone, there must coexist with the power an interest in the thing or estate to be disposed of or managed under the power."<sup>120</sup>

<sup>117</sup> *Debenham v. Mellon*, 5 Q. B. Div. 394.

<sup>118</sup> *Hutchins v. Beard*, 34 N. Y. 24; *Guthrie v. Railroad Co.*, 40 Ill. 109; *Chambers v. Seay*, 73 Ala. 372; *Wheeler v. Knaggs*, 8 Ohio, 169; *Kindig v. March*, 15 Ind. 248.

<sup>119</sup> *Smart v. Sanders*, 5 C. B. 895, 917.

<sup>120</sup> *Hartley's Appeal*, 53 Pa. St. 212. And see *Hunt v. Rousmanler*, 8 Wheat. 174; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Chambers v. Seay*, 73 Ala. 373; *Alworth v. Seymour*, 42 Minn. 523, 44 N. W. Rep. 1030; *Gilbert v. Holmes*, 64 Ill. 548; *Oregon Sav. Bank v. Mortgage Co.*, 35 Fed. Rep. 22; *Barr v. Schroeder*, 32 Cal. 609; *Darrow v. St. George*, 8 Colo. 592, 9 Pac. Rep. 791.

*Operation of Law.*

An agency may also be revoked by operation of law in certain cases. If the subject-matter of the agency is extinguished or ceases to exist, this will revoke the agency. It has been held, for instance, that where two persons jointly appoint an agent to take charge of some matter in which they are jointly interested, as to sell real estate owned by them jointly, a severance of the joint interest revokes the agency.<sup>121</sup> And, where a landowner employed several different agents to act for him in the sale of the same tract of land, a sale by one of them was held a revocation of the authority of the others.<sup>122</sup>

The bankruptcy of the principal determines an authority given while he was solvent.<sup>123</sup>

At common law, the marriage of a female principal determines an authority given while sole.<sup>124</sup>

The insanity of the principal annuls or suspends an authority given while sane,<sup>125</sup> but subject to this limitation, namely, that where a person, while sane, holds out another as having authority, and afterwards becomes insane, his insanity does not revoke the agent's authority as to persons to whom he has been so held out, and who have no notice of the principal's condition.<sup>126</sup>

The death of the principal determines at once the authority of the agent, leaving the third party without a remedy upon contracts entered into by the agent when ignorant of the death of his prin-

<sup>121</sup> *Rowe v. Rand*, 111 Ind. 206, 12 N. E. Rep. 377.

<sup>122</sup> *Ahern v. Baker*, 34 Minn. 98, 24 N. W. Rep. 341.

<sup>123</sup> *Parker v. Smith*, 16 East, 386; *Minett v. Forrester*, 4 Taunt. 541.

<sup>124</sup> *Anon.*, 1 Salk. 390; *Brown v. Miller*, 46 Mo. App. 1; *Charnley v. Winstanley*, 5 East, 266.

<sup>125</sup> *Davis v. Lane*, 10 N. H. 156; *Matthiessen, etc., Co. v. McMahon*, 38 N. J. Law, 536. "An agent always acts in the name of the principal. Agency presupposes the presence of the principal in the person of, and acting through, the agent. The power that binds is not that of the agent, but the power of the principal acting through the agent. When a person loses the power to bind himself by his own acts, it is true, as a general principle, that that loss works a like loss in all those upon whom he has conferred the power to bind him." *Motley v. Head*, 43 Vt. 633.

<sup>126</sup> *Drew v. Nunn*, 4 Q. B. Div. 689; *Davis v. Lane*, 10 N. H. 156.

cipal.<sup>127</sup> The agent in such case is not personally liable as having contracted on behalf of a principal who did not exist; nor is the estate of the deceased liable, for the authority was given for the purpose of representing the principal, and not his estate.<sup>128</sup> Necessarily, the death of the agent determines the agency.<sup>129</sup> And, where two persons are jointly appointed agents to take charge of a particular business for a specified term or purpose, the agency is revoked by the death or insanity of one of them.<sup>130</sup>

Determination of an agency by operation of law does not take place where the authority is coupled with an interest.<sup>131</sup>

<sup>127</sup> *Hunt v. Rousmanier*, 8 Wheat. 174; *Davis v. Windsor Sav. Bank*, 46 Vt. 728; *Webber v. Bridgman*, 118 N. Y. 600, 21 N. E. Rep. 985; *Galt v. Galloway*, 4 Pet. 331; *Gale v. Tappan*, 12 N. H. 145; *Home Nat. Bank v. Waterman*, 134 Ill. 461, 29 N. E. Rep. 508; *Travers v. Crane*, 15 Cal. 12; *Clayton v. Merritt*, 52 Miss. 353; *Lewis v. Kerr*, 17 Iowa, 73; *Saltmarsh v. Smith*, 32 Ala. 404; *Rigs v. Cage*, 2 Humph. (Tenn.) 350; *Cleveland v. Williams*, 29 Tex. 204; *Staples v. Bradbury*, 8 Greenl. (Me.) 181; *Smith v. Smith*, 1 Jones (N. C.) 135; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 293. But see *Dick v. Page*, 17 Mo. 234. Payment to an agent, in ignorance of his principal's death, has been held valid. *Cassiday v. McKenzie*, 4 Watts & S. (Pa.) 282. It has been held that where an agent sends an order by mail, on the day before the death of his principal, to a nonresident merchant, and the latter fills the order within a reasonable time in ignorance of the death of the principal, the contract is binding as of the day the order was deposited in the mail. *Garrett v. Trabue*, 32 Ala. 227, 3 South. Rep. 149.

<sup>128</sup> *Blades v. Free*, 9 Barn. & C. 167.

<sup>129</sup> *In re Merrick's Estate*, 8 Watts & S. (Pa.) 402; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Lehigh Coal & Nav. Co. v. Mohr*, 83 Pa. St. 228.

<sup>130</sup> *Rowe v. Rand*, 111 Ind. 206, 12 N. E. Rep. 377; *Martine v. Insurance Co.*, 53 N. Y. 339.

<sup>131</sup> *Davis v. Lane*, 10 N. H. 160; *Hunt v. Rousmanier*, 8 Wheat. 174; *Knapp v. Alvord*, 10 Paige, Ch. (N. Y.) 205; *Merry v. Lynch*, 68 Me. 94; *Travers v. Crane*, 15 Cal. 12. And see cases above cited; *Watson v. King*, 4 Camp. 274.



**CHAPTER XIII.****QUASI CONTRACT.**

- §11. In General.**
- §12. Judgments.**
- §13. Obligations Imposed by Statute.**
- §14. Acts of the Parties—In General.**
- §15. Account Stated.**
- §16. Money Paid for the Use of Another.**
- §17. Money Received for the Use of Another.**
- §18. Recovery for Benefits Conferred.**

**IN GENERAL.**

**§11. Ordinarily, a person can only maintain an action ex contractu against another by proving a contract in fact. There are circumstances, however, under which the law will create a fictitious promise for the purpose of allowing the remedy by action of assumpsit. The obligation is not a contract, but a quasi contract. It may arise—**

- (a) From the judgment of a court entered otherwise than by consent.**
- (b) From a duty imposed by statute.**
- (c) From the acts of the parties.**

As we have seen in treating of the nature of contract, every true contract involves, not only obligation, but agreement. If there is no agreement, there can be no true contract. There may be an obligation, but, unless this obligation is imposed by the free consent of the parties, the obligation is not a contractual obligation. You may call it contract, as you may call black "white," but calling it so cannot make it contract. The term "implied contract" has been used in a confusing way. It has been used to indicate a contract made in fact, and evidenced by the conduct of the parties; and it has also been used to indicate an obligation created by law, and clothed with a semblance of contract, for the purpose of allowing the remedy by action of assumpsit, but which in fact is not a

contract at all. The latter use of the term is unfortunate, and the sooner we abandon it the better. The proper term for such obligations is "quasi contract,"—a term borrowed from the Roman law.

If a person goes into a store, and, with the tradesman's cognizance, takes up an article and carries it off with him, the law will imply a promise on his part to pay for it. So, if a person allows another to work for him under such circumstances that no reasonable man would suppose that he intends to do the work for nothing, the law will imply a promise to pay for the work. The promise is implied, however, not as a matter of law, but as a matter of fact. There is an actual agreement and promise, evidenced, not by express words, but by conduct. To say that the law implies a contract is merely to say that the law looks at the evidence, and holds that the parties, by their conduct, have shown an intention, the one to offer his goods or services, and the other to accept and pay for them. The law does not create the obligation. It is created by the parties themselves, and the law merely says that they have, by their conduct, expressed their intention, just as it would hold that words in a spoken or written contract express a certain intention. There is no difference between the two contracts except in the evidence of the intention of the parties. In both there is agreement in fact, and therefore a true contractual relation.

On the other hand, there is a class of obligations which are implied or created by law without any agreement at all between the parties, and even against the dissent of the party upon whom the obligation is imposed. Where, for instance, a party has paid out money which another ought to have paid, the law implies, or, to be more accurate, creates, an obligation on the part of the latter to repay him, and, by allowing him to maintain an action of *assumpsit* to enforce this obligation, clothes it with the semblance of contract. So, if one man has obtained money from another by oppression, imposition, extortion, or deceit, or by the commission of a trespass, the money may be recovered, for the law creates a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention.<sup>1</sup> Such

<sup>1</sup> *Dusenbury v. Speir*, 77 N. Y. 150.

obligations as these are implied or created by law without regard to the intention of the parties. They are called "quasi contracts," because, as the term implies, they are not contract at all, but have a semblance of contract in that they may be enforced by an action of assumpsit. "Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all."<sup>2</sup>

Most of the text-books treat this obligation as a true, simple contract. They divide simple contracts into (1) express contracts; (2) contracts implied in fact; and (3) contracts implied in law. This can only be confusing. "This treatment of quasi contract," it is said by a writer of the highest authority, "is, in the opinion of the writer, not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and therefore vicious in practice. It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent."<sup>3</sup>

The origin of quasi contract was the change of remedy in English law from debt to assumpsit. Debt was the remedy for cases of breach of a promise made upon consideration executed, where such a breach resulted in a liquidated or ascertained money claim; and later this action came to be applied to any breach of contract resulting in a similar claim. And debt was also the remedy in cases where a statute, or the common law, or custom laid a duty upon one to pay an ascertained sum to another. The action of assumpsit was primarily an action to recover an unliquidated sum, or such damages as the breach of a promise had occasioned to the promisee, and it was at first inapplicable to legal liabilities arising otherwise than upon a contract springing from mutual promises. The term implies a promise. Owing to certain inconveniences attaching to the action of debt, its field was gradually encroached

<sup>2</sup> Dusenbury v. Speir, *supra*. See, also, Lawson v. Lawson, 16 Grat. (Va.) 230; Sceva v. True, 53 N. H. 627; Hertzog v. Hertzog, 29 Pa. St. 405; Montgomery v. Waterworks, 77 Ala. 248; Keener, Quasi Cont. 3-15.

<sup>3</sup> Keener, Quasi Cont. 3.

upon by the action of *assumpsit*. The action of *assumpsit* came to be used instead of debt where the contract resulted in a liquidated claim. The next step was the use of *indebitatus* counts in *assumpsit*. Where the breach of a contract resulted in a liquidated claim, the pleadings were reduced to a short statement of a debt originating in a request by the defendant, and a promise by him to pay. This enabled claims arising from contract to be variously stated in the same suit, in the form of a special agreement which had been broken, and in the form of a debt resulting from an agreement, and consequently importing a promise to pay it. Such a mode of pleading was called an "*indebitatus count*," or "*count in indebitatus assumpsit*." The remedy upon a special contract which resulted in a liquidated claim was now capable of being reduced to the shape of an action for debt with the addition of a promise to pay it. In this form it came to be applied to those kinds of legal liability which had previously given rise to the action of debt, though devoid of the element of agreement. The law, for the purposes of the action, implied or created a promise. The promise was fictitious. It was necessary to support *assumpsit*, and therefore was created by the law. It was in this way that these obligations became clothed with a semblance of contract. For the convenience of the remedy they have been made to figure as though they sprang from contract, and have appropriated the form of agreement.<sup>4</sup>

Quasi contracts may arise (1) from the judgment of a court of competent jurisdiction; (2) from a duty imposed by statute; or (3) from the acts of the parties.

#### JUDGMENT.

**312.** The judgment of a court of competent jurisdiction, entered otherwise than by consent, is sometimes called a "*contract of record*." The obligation, however, is not contractual, but quasi contractual.

The judgment of a court of competent jurisdiction, ordering a sum of money to be paid by one of two parties to another, is not

<sup>4</sup> Anson, *Cont.* 363.

merely enforceable by the process of the court, but can be sued upon as creating a debt between the parties.<sup>6</sup> The law will create a fictitious promise to pay, which will support an action of assumpsit. This obligation may come into existence as the final result of litigation, when the court pronounces judgment, or it may be created by agreement between the parties before litigation has commenced, or during its continuance. In the latter case there is agreement resulting in obligation, and the judgment has the features of contract. In the former, however, there is no consent on the part of the person bound. There is obligation, but there is no agreement, and therefore there is no contract. The obligation is imposed by law, notwithstanding the dissent of the person bound. In order that the creditor may be allowed to enforce the judgment by an action of assumpsit thereon, the law creates a promise by the debtor to pay the judgment. The promise is a mere fiction of the law for the purpose of the remedy. In this way the law has merely clothed a judgment, entered otherwise than by consent, with the semblance of a contract. It needs no argument to show that it is a quasi contract, and not a true contract.<sup>6</sup>

#### OBLIGATION IMPOSED BY STATUTE.

313. Where an obligation to pay money is imposed by statute, it may be enforced by an action of assumpsit. The obligation is therefore quasi contractual.

Where a liability to pay money is imposed by statute without the consent of the person bound, it cannot be said that the obligation springs from contract. As in the case of a judgment, the law merely creates the fiction of a promise to pay the money, so that assumpsit will lie to recover it. The obligation is not contractual,

<sup>6</sup> *Williams v. Jones*, 13 Mees. & W. 628.

<sup>6</sup> *Keener*, *Quasi Cont.* 16; *State of Louisiana v. Mayor, etc., of City of New Orleans*, 109 U. S. 285, 3 Sup. Ct. Rep. 211; *O'Brien v. Young*, 95 N. Y. 428; *Rae v. Hulbert*, 17 Ill. 572; *Morse v. Tappan*, 3 Gray (Mass.) 411; *Gutta-Percha & R. Manuf'g Co. v. City of Houston*, 108 N. Y. 276, 15 N. E. Rep. 402.

but quasi contractual.<sup>7</sup> Illustrations of such an obligation arise where a statute imposes a duty upon one county or parish to pay another for money expended in the support of a pauper; or under any other circumstances declares that one person may recover from another money paid out by him for the benefit of the latter; or where a statute allows an action to recover usury paid, or money lost and paid on a wager.

#### ACTS OF THE PARTIES—IN GENERAL.

314. The acts of the parties may bring about an obligation quasi ex contractu—

- (a) Where one person makes an admission of a claim due to another upon an account stated.
- (b) Where one person pays money which another person ought to pay.
- (c) Where one person receives money which another ought to receive.
- (d) Where one person confers benefits upon another for which the latter ought to pay.

In all of these cases except the first, the obligation rests, as said by Professor Keener, "upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another."<sup>8</sup> "The action of indebitatus assumpsit for money had and received will lie whenever one has the money of another which he has no right to retain, but which, ex aequo et bono, he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice; and it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such a case no express promise need be proved, because from such relation between the parties the law

<sup>7</sup> Keener, Quasi Cont. 16; *Inhabitants of Milford v. Com.*, 144 Mass. 64, 10 N. E. Rep. 516; *Pacific M. Steamship Co. v. Jolliffe*, 2 Wall. 450; *Woods v. Ayres*, 39 Mich. 345; *Town of Woodstock v. Town of Hancock*, 62 Vt. 248, 19 Atl. Rep. 991; *McCoun v. Railroad Co.*, 50 N. Y. 176.

<sup>8</sup> Keener, Quasi Cont. 19.

will imply a debt, and give this action, founded on the equity of the plaintiff's case, as it were upon a contract,—‘quasi ex contractu’ as the Roman law expresses it,—and upon this debt founds the requisite undertaking to pay.”<sup>9</sup>

### ACCOUNT STATED.

**315. An account stated is the admission of a balance due from one party to another. The statement of the account and admission of the balance implies a promise in law to pay it.**

An account stated is an admission by one party who is in account with another that there is a certain balance due from him.<sup>10</sup> The admission that a balance is due imports a promise to pay upon request, which may be sued upon as though it created a liability *ex contractu*, without proving an express promise.<sup>11</sup> “The account stated is nothing more than the admission of a balance due from one party to another; and, that balance being due, there is a debt. \* \* \* The very statement of the account and admission of the balance implies a promise in law to pay it.”<sup>12</sup> The action is on the account stated, and not on the contract out of which the claim arose.

In order to constitute an account stated, there must be a statement or positive admission of some certain amount of money being due.<sup>13</sup> A letter from a person, to the effect that he thinks he is

<sup>9</sup> *Lawson v. Lawson*, 16 Grat. (Va.) 230. And see *Culbreath v. Culbreath*, 7 Ga. 64; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460.

<sup>10</sup> *Irving v. Velitch*, 3 Mees. & W. 106; *Toland v. Sprague*, 12 Pet. 300; *Ware v. Manning*, 86 Ala. 238, 5 South. Rep. 682; *Truman v. Owen*, 17 Or. 523, 21 Pac. Rep. 665; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96.

<sup>11</sup> *Hopkins v. Logan*, 5 Mees. & W. 241; *Marshall v. Lewark*, 117 Ind. 377; 20 N. E. Rep. 253; *Fowell v. Railway Co.*, 65 Mo. 658; *Warren v. Caryl*, 61 Vt. 331, 17 Atl. Rep. 741.

<sup>12</sup> *Irving v. Velitch*, *supra*; *Watkins v. Ford*, 69 Mich. 357, 37 N. W. Rep. 300; *St. Louis, I. M. & S. Ry. Co. v. Bank*, 47 Ark. 541, 1 S. W. Rep. 704.

<sup>13</sup> *Wayman v. Hilliard*, 7 Bing. 101; *Chisman v. Count*, 2 Man. & G. 307; *Peacock v. Harris*, 10 East, 104; *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. Rep. 131; *Ingraham v. Lukens*, 30 S. C. 616, 9 S. E. Rep. 348; *Weed v. Dyer*, 53 Ark. 155, 13 S. W. Rep. 592. The mere fact that a paper is marked “Errors

indebted in a certain amount, is not sufficient;<sup>14</sup> nor is an admission by a person to the effect merely that he has received a sum of money on account of another, and not that it is a subsisting debt;<sup>15</sup> nor an admission of money being due, without specifying expressly or by sufficient reference a definite amount;<sup>16</sup> nor an admission of liability to a claim for unliquidated damages.<sup>17</sup> An acknowledgment of a debt payable at a future date, or in a certain event, also constitutes an account stated, but the liability is not absolute until the time of payment has arrived, or the event has happened.<sup>18</sup> An admission of debt, in order to constitute an account stated, must be made to the creditor himself or to his agent. It is not sufficient if made to a stranger.<sup>19</sup> And it must be made by the defendant himself or by his agent.<sup>20</sup> The admission may be in writing or by mere oral statement;<sup>21</sup> and even a failure to object to an account presented and examined may be a sufficient admission.<sup>22</sup> An ac-

and omissions excepted" does not deprive it of its character as an account stated. *Kent v. Highleyman*, 28 Mo. App. 614; *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. Rep. 1086.

<sup>14</sup> *Hughes v. Thorpe*, 5 Mees. & W. 656.

<sup>15</sup> *Tucker v. Barrow*, 7 Barn. & C. 623.

<sup>16</sup> *Teal v. Anty*, 2 Brod. & B. 90; *Lane v. Hill*, 18 Q. B. 252.

<sup>17</sup> *Marshall v. Wilson* (Ex. Ch. Ir.) 14 Wkly. Rep. 699.

<sup>18</sup> *Wheatley v. Williams*, 1 Mees. & W. 533.

<sup>19</sup> *Tucker v. Barrow*, 7 Barn. & C. 623; *Jardine v. Payde*, 1 Barn. & Adol. 663.

<sup>20</sup> *Bates v. Townley*, 2 Exch. 152. Balancing an account on a person's own books does not constitute an account stated, unless done with the consent of the other party. *Nostrand v. Ditmils*, 127 N. Y. 355, 28 N. E. Rep. 27.

<sup>21</sup> *Leake*, Cont. 70; *Freeman v. Howell*, 4 La. Ann. 196. Where a person to whom a bill has been rendered sends his bill to the other party for a larger amount, with the amount of the first-mentioned bill credited thereon, this is a sufficient admission. *Bewick v. Butterfield*, 60 Mich. 203, 26 N. W. Rep. 881; *Beals v. Wagener*, 47 Minn. 489, 50 N. W. Rep. 535.

<sup>22</sup> *Langdon v. Roane*, 6 Ala. 518; *Hendy v. March*, 75 Cal. 566, 17 Pac. Rep. 702; *Dickerson v. Scheuer* (Super. N. Y.) 1 N. Y. Supp. 419; *Brown v. Van Dyke*, 8 N. J. Eq. 795; *Anding v. Levy*, 57 Miss. 51; *Eichel v. Sawyer*, 44 Fed. Rep. 845; *Lockwood v. Thorne*, 11 N. Y. 170; *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. Rep. 1086; *Mackin v. O'Brien*, 83 Ill. App. 474; *Freeman v. Howell*, 4 La. Ann. 196. Provided, however, that, when the account was rendered, the parties had not already come to a disagreement, so that assent from silence cannot reasonably be inferred. *Edwards v. Hoeffinghoff*, 38 Fed. Rep. 635.



count stated, it has been said, is not conclusive, but is merely *prima facie*, evidence of liability;<sup>23</sup> but this is not true. The existence or validity of the debt may, it is true, be disputed by showing mistake, fraud, conditions, or illegality of consideration;<sup>24</sup> but it cannot otherwise be shown that the amount stated was not in fact due.<sup>25</sup>

### MONEY PAID FOR THE USE OF ANOTHER.

316. Wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter,—a request to make the payment, and a promise to repay,—and the obligation thus created may be enforced by *assumpsit*.

It is a rule of law that no man "can make himself the creditor of another by paying that other's debt against his will or without his consent,"<sup>26</sup> or at least without some act on his part which will

<sup>23</sup> Leake, Cont. 71.

<sup>24</sup> *Trueman v. Hurst*, 1 Term R. 40; *Thomas v. Hawkes*, 8 Meea. & W. 140; *Leather Manufrs' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657; *Dickerson v. Nabb*, Sneed (Ky.) 320; *Gough v. Findon*, 7 Exch. 48; *French v. French*, 2 Man. & G. 644; *Rehill v. McTague*, 114 Pa. St. 82, 7 Atl. Rep. 224; *Rose v. Savory*, 2 Bing. N. C. 145; *Ware v. Manning*, 86 Ala. 236, 5 South. Rep. 682; *Waldron v. Evans*, 1 Dak. 11, 46 N. W. Rep. 607; *Bright v. Coffman*, 15 Ind. 371.

<sup>25</sup> *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. Rep. 76; *Neff v. Wooding*, 83 Va. 432, 2 S. E. Rep. 731; *Kilpatrick v. Henson*, 81 Ala. 464, 1 South. Rep. 188; *Manchester Paper Co. v. Moore*, 104 N. Y. 680, 10 N. E. Rep. 861; *Somers v. Cresse* (N. J. Ch.) 13 Atl. Rep. 23; *Smith v. Ogilvie* (Sup.) 5 N. Y. Supp. 382; *Moscowitz v. Lemp* (Ark.) 12 S. W. Rep. 781; *Fleischner v. Kubil*, 20 Or. 328, 25 Pac. Rep. 1086; *Hawley v. Hanan*, 79 Wis. 379, 48 N. W. Rep. 676; *Brown v. Vandyke*, 8 N. J. Eq. 795; *Langdon v. Roane*, 6 Ala. 518. Although parties may have agreed upon a statement of account, they may, by mutual consent, waive this, and agree to a reopening and restatement. *Horn v. Railway Co.*, 37 Minn. 375, 34 N. W. Rep. 593.

<sup>26</sup> *Johnson v. Packet Co.*, L. R. 3 C. P. 43; *Durnford v. Messiter*, 5 Maule & S. 446; *Hearn v. Cullen*, 54 Md. 533; *Turner v. Egerton*, 1 Gill. & J. (Md.) 430; ante, p. 510.

prevent him from withholding consent. Assumpsit will not lie, therefore, for money officiously paid by the plaintiff for the defendant's use. The defendant must have requested such payment, or he must, by his conduct, have made it necessary for the plaintiff to pay. Where a person expressly requests another to pay money for him under such circumstances as to import a promise to repay, and the money is paid in accordance with the request, the transaction involves an actual agreement. Where no request in fact exists, and there is no agreement in fact respecting the payment, the law may imply a fictitious request. As a rule, wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter,—a request to make the payment, and a promise to repay. It will not do to say that there was no agreement in fact, for the law creates the promise.<sup>27</sup> "The contract is created in law upon an implied request existing in fact, where the plaintiff has been compelled by law to pay, or being compellable by law, has paid, money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability."<sup>28</sup>

A good illustration of such an obligation is where one of several sureties, or other joint debtors, pays the whole debt. In such a case he is allowed to recover from each of the others his proportionate share. A request to pay and a promise to repay are feigned in order to entitle him to the remedy of assumpsit.<sup>29</sup> So, where

<sup>27</sup> *Exall v. Partridge*, 8 Term R. 308; *Sapsford v. Fletcher*, 4 Term R. 511; *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. Rep. 677; *Grissell v. Robinson*, 3 Bing. N. C. 10; *Wells v. Porter*, 7 Wend. (N. Y.) 119; *Houser v. McGinnas*, 108 N. C. 631, 13 S. E. Rep. 139; *Hawley v. Beverley*, 6 Man. & G. 221; *Johnson v. Packet Co.*, L. R. 3 C. P. 38; *Hales v. Freeman*, 1 Brod. & B. 391; *Hutzler v. Lord*, 64 Md. 534, 3 Atl. Rep. 891; *Turner v. Egerton*, 1 Gill & J. (Md.) 430; *City of Baltimore v. Hughes*, Id. 480; *Iron City Tool-Works v. Long* (Pa. Sup.) 7 Atl. Rep. 82; *Beard v. Horton*, 86 Ala. 202, 5 South. Rep. 207; *Perin v. Parker*, 25 Ill. App. 465.

<sup>28</sup> *Leake*, Cont. 41.

<sup>29</sup> *Kemp v. Fender*, 12 Mees. & W. 421; *Holmes v. Williamson*, 6 Maule & S. 158; *Davies v. Humphreys*, 6 Mees. & W. 153; *Deering v. Winchelsea*, 2 Bos. & P. 270; *Norton v. Coons*, 6 N. Y. 33; *Doremus v. Selden*, 19 Johns.

an executor was compelled to pay a legacy duty for which the legatee was ultimately liable, he was allowed to recover the amount from the legatee as money paid for his use.<sup>20</sup>

The right of indemnity which is possessed by one whom circumstances make an agent of necessity for another may be classed among these forms of quasi contractual obligation. A person places another in a certain relation to himself without giving him authority to do acts which their relations may necessitate. The latter is compelled to act as though he possessed such authority, and the law will then presume that its exercise was requested and agreed to.<sup>21</sup>

Another class of cases falling under this head are cases in which a person is compelled by the wrong or fraud of another to pay money to a third person. He may recover the amount from the person so guilty of the wrong or fraud.<sup>22</sup> Where, for instance, a

(N. Y.) 213; *Tobias v. Rogers*, 13 N. Y. 59; *Johnson v. Harvey*, 84 N. Y. 363; *Aldrich v. Aldrich*, 56 Vt. 324; *Jackson v. Murray*, 77 Tex. 644, 14 S. W. Rep. 235; *Nickerson v. Wheeler*, 118 Mass. 295; *Wilton v. Tazwell*, 86 Ill. 29; *Yates v. Donaldson*, 5 Md. 380; *Sears v. Starbird*, 78 Cal. 223, 20 Pac. Rep. 547; *Fletcher v. Grover*, 11 N. H. 368; *Foster v. Burton*, 62 Vt. 239, 20 Atl. Rep. 326; *Logan v. Trayser*, 77 Wis. 579, 46 N. W. Rep. 877; *Bushnell v. Bushnell*, 77 Wis. 435, 46 N. W. Rep. 442. In some jurisdictions, contribution between cosureties must be enforced in equity. *Longley v. Griggs*, 10 Pick. (Mass.) 121; *McDonald v. Magruder*, 3 Pet. 470. And, where a surety has been compelled to pay the debt, he may, on the same principle, where there is no express contract with the principal (*Toussaint v. Martinant*, 2 Term R. 100), recover the amount from his principal, as for money paid to his use. *Alexander v. Vane*, 1 Mees. & W. 511; *Pownal v. Ferrand*, 6 Barn. & C. 439; *Crisfield v. State*, 55 Md. 192. As a rule, no right of contribution exists between joint wrongdoers. *Merryweather v. Nixan*, 8 Term R. 186; *Boyer v. Bolender*, 129 Pa. St. 324, 18 Atl. Rep. 127. But the rule does not apply where one of them is innocent of any intentional or actual wrong, and has been compelled to pay damages which the other, who was the actual wrongdoer, should have paid. In such a case, on equitable principles, contribution may be enforced. *Churchill v. Holt*, 127 Mass. 165; *Farwell v. Becker*, 129 Ill. 261, 21 N. E. Rep. 792; *Port Jervis v. Bank*, 96 N. Y. 550; *Bailey v. Bussing*, 28 Conn. 455.

<sup>20</sup> *Foster v. Ley*, 2 Bing. N. C. 269; *Bate v. Payne*, 13 Q. B. 900; *Hales v. Freeman*, 1 Brod. & B. 391.

<sup>21</sup> Ante, p. 715; *Brittain v. Lloyd*, 14 Mees. & W. 762; *Pollock v. Stables*, 12 Q. B. 765.

<sup>22</sup> *Bleaden v. Charles*, 7 Bing. 246; *Smith v. Cuff*, 6 Maule & S. 100; *Horton v. Riely*, 11 Mees. & W. 402; *Van Santen v. Oil Co.*, 81 N. Y. 171.

member of a firm gives a promissory note, signed in the partnership name, for a debt of his own, and his partner is compelled to pay it, the latter may recover from the former as for money paid to his use;<sup>33</sup> and where a carrier, by mistake, delivers goods to the wrong person, and he wrongfully detains them, so that the carrier is compelled to pay their value, he is liable to the carrier for the amount so paid.<sup>34</sup>

It must be remembered, as stated at the beginning of this paragraph, that it is not every payment on another's account that will make the latter liable. No implied promise to repay is raised where a person makes a payment voluntarily, and without any legal liability or compulsion, in discharge of the debt or liability of another;<sup>35</sup> nor where he has been compelled to make the payment by his own wrongful act;<sup>36</sup> nor where the payment is made in discharge of a liability which is a mere moral liability, and is not recognized in law;<sup>37</sup> nor where a payment is made in discharge of another's liability by express agreement with the latter.<sup>38</sup> It has further been held that, to entitle a person to recover from another money paid for the latter's use, there must be some privity between them. Legal liability incurred by one person on behalf of another, without any concurrence or privity on the part of the latter, will not entitle him to recover for money which, under such circumstances, he may pay to the latter's use. The liability must have been in some way cast upon him by the latter. The mere

<sup>33</sup> *Cross v. Cheshire*, 7 Exch. 43.

<sup>34</sup> *Brown v. Hodgson*, 4 Taunt. 188. And see *Long Champs v. Kenny*, 1 Doug. 137.

<sup>35</sup> *Bates v. Townley*, 2 Exch. 152; *Sleigh v. Sleigh*, 5 Exch. 514. Payment of money by a person to procure the release of his property from seizure for another's debt does not impose any liability on the latter if the seizure was unlawful, or rather unless it is shown that it was lawful. *Myers v. Smith*, 27 Md. 91.

<sup>36</sup> *Pitcher v. Bailey*, 8 East, 171. Where an officer, for instance, having custody of a prisoner for debt, suffered him to go at large, and, in consequence, was compelled to pay the creditor himself, it was held that he could not recover the amount from the debtor. *Pitcher v. Bailey*, *supra*.

<sup>37</sup> *Atkins v. Banwell*, 2 East, 505.

<sup>38</sup> Action must be brought on the express agreement. *Spencer v. Parry*, 3 Adol. & E. 331; *Lubbock v. Tribe*, 3 Mees. & W. 607.

fact that he has paid, under compulsion of law, what the latter might have been compelled to pay, will give him no right of action against the latter. In an English case, the plaintiff, being entitled under a bill of sale to seize the defendant's goods, did so, but left the goods on the defendant's premises until rent fell due to the defendant's landlord. The landlord distrained the goods, whereupon the plaintiff paid the rent, and sued the defendant for the amount, as having been paid to his use. It was held that the facts gave the plaintiff no right of action. "Having seized the goods under the bill of sale," it was said, "they were his absolute property. He had a right to take them away; indeed, it was his duty to take them away. He probably left them on the premises for his own purposes. \* \* \* At all events, they were not left there at the request, or for the benefit, of the defendant."<sup>39</sup>

In all cases, to entitle the plaintiff to recover there must have been a payment, not necessarily of money, but of property at least, accepted as payment and in extinguishment of the claim. The giving of a bond or note, for instance, is not sufficient, for "the mere extinguishment of the original liability by way of new security will not avail."<sup>40</sup> It is otherwise, however, if land or other property is transferred absolutely as payment, and in extinguishment of the claim.<sup>41</sup>

### MONEY RECEIVED FOR THE USE OF ANOTHER.

317. Wherever one person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay it to the latter, and the obligation may be enforced by *assumpsit*.

Contracts arising from agreement frequently result in the receipt and holding of money by one of the parties for the use of the

<sup>39</sup> *England v. Marsden*, L. R. 1 C. P. 529. And see *Bay City Bank v. Lindsay*, 94 Mich. 176, 54 N. W. Rep. 42. But see *Edmunds v. Wallingford*, 14 Q. B. Div. 811.

<sup>40</sup> *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662; *Taylor v. Higgins*, 3 East, 170; *Cumming v. Hackley*, 8 Johns. (N. Y.) 202.

<sup>41</sup> *Ainslie v. Wilson*, *supra*; *Randall v. Rich*, 11 Mass. 494.

other; as, where a person is employed by another as agent to receive money, and to account for and pay over the amount received, and receives money by virtue of his employment. In such a case his obligation results from his express agreement.<sup>42</sup> In some cases a similar obligation is created by law. The receipt by one person of money to which another person is entitled, under some circumstances, creates a debt without agreement, and even against dissent. The law creates the debt and a promise to pay it. The debt is technically described as a debt "for money received by the defendant for the use of the plaintiff," or "for money had and received." It has been said that such an action will lie whenever the defendant has money to which, in equity and good conscience, the plaintiff is entitled;<sup>43</sup> that the action is equitable in its nature, and will lie, generally, wherever a bill in equity would lie.<sup>44</sup>

The obligation thus created from the receipt of money can arise only in respect of money or what is equivalent to money.<sup>45</sup> Goods received by the defendant, for instance, cannot be treated as money, so as to support such an action, so long as they are undisposed of and remain in the defendant's hands;<sup>46</sup> but it is otherwise where

<sup>42</sup> Ante, p. 727.

<sup>43</sup> *Lawson v. Lawson*, 10 Grat. (Va.) 230; *Barnett v. Warren*, 82 Ala. 557, 2 South. Rep. 457; *Merchants' Bank v. Rawls*, 7 Ga. 191; *Glascok v. Lyons*, 20 Ind. 1; *O'Fallon v. Bolsmenu*, 3 Mo. 405; *Boyett v. Potter*, 80 Ala. 476, 2 South. Rep. 534; *Vrooman v. McKaig*, 4 Md. 450; *Teegarden v. Lewis* (Ind. Sup.) 35 N. E. Rep. 24; *O'Conley v. City of Natchez*, 1 Smedes & M. (Miss.) 31; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. Rep. 575. Money paid on judgment before or pending appeal may be recovered after the judgment is reversed. *Chapman v. Sutton*, 68 Wis. 657, 32 N. W. Rep. 683; *Clark v. Pinney*, 6 Cow. (N. Y.) 297; *Kalmbach v. Foote*, 79 Mich. 236, 44 N. W. Rep. 603; *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. Rep. 963; *Scholey v. Halsey*, 72 N. Y. 578. See, also, *Isom v. Johns*, 2 Munf. (Va.) 272.

<sup>44</sup> *Culbreath v. Culbreath*, 7 Ga. 64; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460; *Kennedy v. Insurance Co.*, 3 Har. & J. (Md.) 367.

<sup>45</sup> *Leake*, Cont. 67; *Keener*, Quasi Cont. 139, 170; *Foster v. Dupre*, 5 Mart. (Ga.) 6; *Brundage v. Village of Port Chester*, 102 N. Y. 494, 7 N. E. Rep. 398; *Lee v. Merritt*, 8 Q. B. 820; *Nightingale v. Devisme*, 5 Burrows, 2589; *Scott v. Miller*, 3 Bing. N. C. 811; *Atkins v. Owen*, 4 Adol. & E. 819; *Balch v. Patten*, 45 Me. 41; *Libby v. Robinson*, 79 Me. 168, 9 Atl. Rep. 24.

<sup>46</sup> *Thurston v. Mills*, 16 East, 254; *Hendricks v. Goodrich*, 15 Wis. 679; *Moses v. Arnold*, 43 Iowa, 187; *Stearns v. Dillingham*, 22 Vt. 624; *Smith v.*

they have been sold and converted into money by him.<sup>47</sup> In such a case the right to recover is based on the receipt by the defendant of money belonging to the plaintiff, and the amount of money received, and not the value of the goods, is the measure of recovery. It follows from this that if the money, or an equivalent, is not received for the goods, even though they may have been sold;<sup>48</sup> or if they have been merely exchanged for other goods;<sup>49</sup> or if the amount cannot be ascertained,<sup>50</sup>—the action will not lie. The plaintiff must seek some other remedy.

It has been said that an action for money had and received will not lie unless there is some privity between the plaintiff and the defendant;<sup>51</sup> but there need be no privity other than such as arises out of the fact that the defendant has received the plaintiff's money, which in equity and good conscience he ought not to retain.<sup>52</sup>

*Same—Debts Arising from Tort—Waiver of Tort.*

A frequent illustration of a quasi contractual obligation of this kind arises where a person obtains another's money by wrongful or fraudulent means. Where one person has wrongfully taken another's money, or has taken his property and converted it into money, the latter has a right of action *ex delicto* for the wrong done to him, as by an action of trespass or trover, or by an action on the case for the fraud. He is not always restricted, however, to an ac-

Jernigan, 83 Ala. 256, 3 South. Rep. 515; Tuttle v. Campbell, 74 Mich. 652, 42 N. W. Rep. 384; Moody v. Walker, 89 Ala. 619, 7 South. Rep. 246.

<sup>47</sup> Leake, Cont. 50; Keener, Quasi Cont. 170; Lamine v. Dorrell, 2 Ld. Raym. 1216; Gilmore v. Wilbur, 12 Pick. (Mass.) 120; Parker v. Orole, 5 Blng. 63; Oughton v. Seppings, 1 Barn. & Adol. 241; Staat v. Evans, 35 Ill. 455; Notley v. Buck, 8 Barn. & C. 160; Olive v. Olive, 95 N. C. 485; Powell v. Rees, 7 Adol. & E. 426; Comstock v. Hier, 73 N. Y. 269; Barnett v. Warren, 82 Ala. 557, 2 South. Rep. 457; Thornton v. Strauss, 79 Ala. 164.

<sup>48</sup> Budd v. Hiller, 27 N. J. Law, 43; Rosenberg v. Block, 54 N. Y. Super. Ct. 537. Receipt of equivalent. Miller v. Miller, 7 Pick. (Mass.) 133; Ainslie v. Wilson, 7 Cow. (N. Y.) 662; Doon v. Ravey, 49 Vt. 293.

<sup>49</sup> Fuller v. Duren, 36 Ala. 73; Kidney v. Persons, 41 Vt. 386.

<sup>50</sup> Saville, Simes & Co. v. Welch, 58 Vt. 683, 5 Atl. Rep. 491; Glascock v. Hazell, 109 N. C. 145, 13 S. E. Rep. 789.

<sup>51</sup> Sergeant v. Stryker, 16 N. J. Law, 464.

<sup>52</sup> Walker v. Conant, 65 Mich. 194, 31 N. W. Rep. 786; Pugh v. Powell (Pa. Sup.) 11 Atl. Rep. 570; Drake v. Whaley, 35 S. C. 187, 14 S. E. Rep. 397.

tion ex delicto for the specific wrong, but may in general waive the tort,<sup>53</sup> and sue in assumpsit for the money as for money received for his use.<sup>54</sup>

The fundamental fact upon which this right of action depends is that the defendant has received money belonging to the plaintiff, or to which the plaintiff is entitled. It is not sufficient to show that the defendant has by fraud or wrong caused the plaintiff to pay money to others than the defendant, or to otherwise sustain loss or damage.<sup>55</sup> "Assuming a defendant to be a tortfeasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plain-

<sup>53</sup> This expression is generally used. As pointed out by Prof. Keener, the doctrine of waiver of tort and suit in assumpsit is simply a question of the election of remedies. "The remedies in tort and assumpsit not being concurrent, a plaintiff is compelled to elect which remedy he will pursue; and, if he elect to sue in assumpsit, he is said to waive the tort." Keener, *Quasi Cont.* 159; *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. Rep. 892. If the plaintiff waives the wrongful character of the taking, or makes his election, by recovering the money as a debt, or otherwise, he thereby precludes himself from taking advantage of it as a tort. *Brewer v. Sparrow*, 7 Barn. & C. 310; *Lithgoe v. Vernon*, 5 Hurl. & N. 180; *Thompson v. Howard*, 31 Mich. 300; *Huffman v. Hughlett*, 11 Lea (Tenn.) 549. He cannot accept the proceeds of his goods which have been wrongfully taken and sold, as a debt, and likewise claim damages for the injury done in the wrongful taking and sale. *Brewer v. Sparrow*, 7 Barn. & C. 310. Moreover, he cannot waive the wrong, or make his election in part only. Therefore, if he accepts part of the proceeds or price of the goods, he is bound to treat the balance as a debt. *Lythgoe v. Vernon*, 5 Hurl. & N. 180. A mere claim to a debt in respect of the value of goods wrongfully obtained, if not acquiesced in by the other party, does not constitute an election so as to waive the tort. *Valpy v. Sanders*, 5 C. B. 886.

<sup>54</sup> *Neate v. Harding*, 6 Exch. 349; *Cory v. Freeholders*, 47 N. J. Law, 181; *Burton v. Driggs*, 20 Wall. 125; *Loomis v. O'Neal*, 73 Mich. 582, 41 N. W. Rep. 701; *People v. Wood*, 121 N. Y. 522, 24 N. E. Rep. 952; *Kidney v. Persons*, 41 Vt. 386; *Lubert v. Chauviteau*, 3 Cal. 458; *Klewert v. Rindskopf*, 46 Wis. 481, 1 N. W. Rep. 163; *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. Rep. 104; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; *Dashaway Ass'n v. Rogers*, 79 Cal. 211, 21 Pac. Rep. 742; *O'Conley v. City of Natchez*, 1 Smedes & M. (Miss.) 31; ante, p. 757.

<sup>55</sup> *National Trust Co. v. Gleason*, 77 N. Y. 400.



tiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort."<sup>56</sup>

It is impossible for us to go at much length into the different circumstances under which the law will create this obligation. It must suffice to mention the most important.

Where a person steals another's money or property, or obtains it by false pretenses, the fact that a crime has been committed will not prevent a civil action by the person injured. He may sue the thief in tort, or he may elect to sue in assumpsit as for money received for his use.<sup>57</sup>

The same is true in any case in which one person, by means of trespass, fraud, or other tortious means, obtains another's money.<sup>58</sup>

So, where a person has obtained money from another under an agreement which the latter has the right to avoid on the ground of fraud, duress, or undue influence, the latter, on avoiding the contract, may recover the amount as money received for his use.<sup>59</sup>

Money obtained by means of duress or compulsion may in like manner be recovered in assumpsit.<sup>60</sup> Duress may consist, as we have seen, in violence or unlawful imprisonment,<sup>61</sup> or threats of

<sup>56</sup> Keener, *Quasi Cont.* 160, citing, among other cases, *Patterson v. Prior*, 18 Ind. 440; *National Trust Co. v. Gleason*, supra; *New York G. & I. Co. v. Gleason*, 78 N. Y. 503; *Tightmeyer v. Mongold*, 20 Kan. 90; *Fanson v. Linsley*, Id. 235. And see *Stockett v. Watkins*, 2 Gill & J. (Md.) 326.

<sup>57</sup> *Holt v. Ely*, 1 EL. & BL. 795; *Chowne v. Baylis*, 31 Law J. Ch. 757; *Stone v. Marsh*, 6 Barn. & C. 531; *Hindmarch v. Hoffman*, 127 Pa. St. 234. 18 Atl. Rep. 14; *Litt v. Martindale*, 18 C. B. 314.

<sup>58</sup> *Cutts v. Phalen*, 2 How. 376; *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. Rep. 104; *Klewert v. Rindskopf*, 46 Wis. 481, 1 N. W. Rep. 163; *Marsh v. Keating*, 1 Bing. N. C. 198; *Cory v. Freeholders*, 47 N. J. Law, 181; *Burton v. Driggs*, 20 Wall. 125.

<sup>59</sup> *Thornett v. Haines*, 15 Mees. & W. 367; *Street v. Blay*, 2 Barn. & Adol. 456; *Dashaway Ass'n v. Rogers*, 79 Cal. 211, 21 Pac. Rep. 742; *Gompertz v. Denton*, 1 Crompt. & M. 207; *Foster v. Bartlett*, 62 N. H. 617; ante, p. 347.

<sup>60</sup> *Shaw v. Woodcock*, 7 Barn. & C. 73; *Atlee v. Backhouse*, 3 Mees. & W. 633; *Chandler v. Sanger*, 114 Mass. 364; *Preston v. City of Boston*, 12 Pick. (Mass.) 7. On this subject generally, see ante, p. 355, and cases there collected.

<sup>61</sup> *De Meunil v. Dakin*, L. R. 3 Q. B. 18. As we have seen in another connection, even a legal arrest and imprisonment may be duress if there is abuse of process. Ante, p. 358; *Richardson v. Duncan*, 3 N. H. 508; *Heckman v. Swartz*, 64 Wis. 48, 24 N. W. Rep. 473.

violence<sup>22</sup> or unlawful imprisonment,<sup>23</sup> in which cases it is duress of the person; or it may be duress of goods, as where property is wrongfully taken or withheld under oppressive circumstances.<sup>24</sup> Further than this, "where money has been obtained \* \* \* by any kind of compulsion or oppression sufficient to render the payment involuntary," it may be recovered as a debt for money received for the use of the plaintiff.<sup>25</sup>

If a mere claim is made upon a person without any legal proceeding, and he pays it with full knowledge of all the circumstances of the claim, and without any compulsion or necessity, the payment is regarded as voluntary, and cannot be recovered back, though the claim was unfounded, and might have been successfully resisted.<sup>26</sup> It seems that it was at one time held that money voluntarily paid could be recovered back if the party receiving it was not entitled

<sup>22</sup> Ante, p. 357.

<sup>23</sup> Ante, p. 358. As we have seen, a threat to arrest or actual arrest of a husband or child is duress of the wife or parent. Ante, p. 362; *Adams v. Bank*, 116 N. Y. 606, 23 N. E. Rep. 7; *Schultz v. Culbertson*, 49 Wis. 122, 4 N. W. Rep. 1070. It must be remembered that it is unlawful to compound a felony, and that money paid to stifle a criminal prosecution cannot be recovered, ante, p. 430; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. Rep. 287; *Gotwalt v. Neal*, 25 Md. 434; *Dixon v. Olmstead*, 9 Vt. 310; unless the circumstances were such that the parties cannot be regarded as being in *pari delicto*, *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. Rep. 353; ante, p. 499.

<sup>24</sup> Ante, p. 360; *Hills v. Street*, 5 Bing. 37; *Astley v. Reynolds*, 2 Strange, 915; *Chandler v. Sanger*, 114 Mass. 364; *Cobb v. Charter*, 32 Conn. 358; *Preston v. City of Boston*, 12 Pick. (Mass.) 7; *Parcher v. Marathon Co.*, 52 Wis. 388, 9 N. W. Rep. 23; *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 10 Sup. Ct. Rep. 5; *Briggs v. Boyd*, 56 N. Y. 289; *Joannin v. Oglivie*, 49 Minn. 564, 52 N. W. Rep. 217. Recovery of money exacted by carrier. *Baldwin v. Steamship Co.*, 74 N. Y. 125; *Peters v. Railroad Co.*, 42 Ohio St. 275; *McGregor v. Railway Co.*, 35 N. J. Law, 89.

<sup>25</sup> *Leake*, Cont. 52, and authorities there collected; *Carew v. Rutherford*, 106 Mass. 1; *Goddard v. Bulow*, 1 Nott & McC. (S. C.) 45; *Westlake & Button v. City of St. Louis*, 77 Mo. 47; *Lehigh Coal & Nav. Co. v. Brown*, 100 Pa. St. 338; *Swift Co. v. U. S.*, 111 U. S. 22, 4 Sup. Ct. Rep. 244; *Regan v. Baldwin*, 126 Mass. 485. Mere threat of suit is not compulsion so as to render a payment to prevent suit involuntary. *Emmons v. Scudder*, 115 Mass. 367; *Awalt v. Building Ass'n*, 34 Md. 435.

<sup>26</sup> *Leake*, Cont. 56; *Spragg v. Hammond*, 2 Brod. & B. 59; *Denby v. Moore*, 1 Barn. & Ald. 123; *Morris v. Tarin*, 1 Dall. 147; *Hall v. Shultz*, 4 Johns. (N. Y.) 240; *Awalt v. Building Ass'n*, 34 Md. 435.

to it;” but it is now virtually settled “that a party may in equity and good conscience continue to hold money voluntarily paid to him under no mistake of fact, and without fraud upon his part.”<sup>68</sup>

*Same—Liability of Third Persons.*

If money wrongfully obtained has passed into the hands of a third person, the law will create a similar promise by him, unless he was a bona fide purchaser or recipient for value; that is, unless he gave a valuable consideration for the money, and had no notice of the fraud or other wrong by which it was obtained.<sup>69</sup> If he was a bona fide purchaser or recipient, he is not liable.<sup>70</sup> The same is true where goods wrongfully obtained or converted have passed into the hands of a third person, and been converted into money.<sup>71</sup>

*Same—Money Received without Fraud or Wrong.*

The right to recover money as having been received by the defendant for the use of the plaintiff is not limited to cases in which the money has been obtained by a tortious act, but extends to many cases in which it has been rightfully obtained, but cannot be rightfully kept.<sup>72</sup> Where a person, for instance, has obtained money from another under an agreement which the latter is entitled to avoid, and does avoid, because of want or failure of consideration,<sup>73</sup> or because of mistake,<sup>74</sup> or because of want of capacity by reason

<sup>68</sup> *Moses v. Macferlan*, 1 W. Bl. 219.

<sup>69</sup> *Brisbane v. Dacres*, 5 Taunt. 144; *Regan v. Baldwin*, 126 Mass. 435; *Benson v. Monroe*, 7 Cush. (Mass.) 125.

<sup>70</sup> *Calland v. Loyd*, 6 Mees. & W. 26; *Bayne v. U. S.*, 93 U. S. 642; *Mason v. Prendergast*, 120 N. Y. 536, 24 N. E. Rep. 806; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. Rep. 496; *Hindmarch v. Hoffman*, 127 Pa. St. 284, 18 Atl. Rep. 14; *Harrison Mach. Works v. Coquillard*, 26 Ill. App. 513; ante, p. 348.

<sup>71</sup> *Foster v. Green*, 7 Hurl. & N. 881. And see *Thacher v. Pray*, 113 Mass. 201; *Newhall v. Wyatt*, 139 N. Y. 452, 34 N. E. Rep. 1045; *Stephens v. Board*, 79 N. Y. 187; *State Bank v. U. S.*, 114 U. S. 401, 5 Sup. Ct. Rep. 888.

<sup>72</sup> *Glyn v. Baker*, 13 East, 509; *Graham v. Dyster*, 6 Maule & S. 1; *Down v. Halling*, 4 Barn. & C. 330.

<sup>73</sup> *Johnson v. Jennings*, 10 Grat. (Va.) 1.

<sup>74</sup> *Post*, p. 774.

<sup>75</sup> *Post*, p. 771; ante, p. 289.

of infancy or insanity,<sup>75</sup> or because of the other party's failure to perform his part of the agreement,<sup>76</sup> the money may be recovered. The money, though obtained without wrong, cannot be rightfully and justly withheld after the contract has been avoided, and the law therefore creates a promise to repay it.

*Same—Money Paid under a Mistake.*

An important class of cases in which an action will lie as for money received by the defendant for the use of the plaintiff is where money is paid under a mistake of fact. As a rule, whenever a person makes a payment to another under such a mistake as to material facts as to create a belief in the existence of a liability to pay which does not really exist, the money may be recovered back as having been received by the person to whom it was paid for the use of the person paying it.<sup>77</sup> If the mistake is caused by the fraud of the person receiving the money, or if he knows of the mistake when he receives the money, the case will fall within the class which we have already considered.<sup>78</sup> We are speaking here of cases in which the mistake is not induced by fraud, and in which both parties may act in perfect good faith. Such an obligation arises where money is paid as due upon the basis of erroneous accounts, and upon a true statement of account is found not to have been due. It may be recovered as money received for the plaintiff's use.<sup>79</sup> The money must have been paid under the belief that it was due. If the plaintiff knew that it was not due, and voluntarily paid it

<sup>75</sup> Ante, pp. 258, 271.

<sup>76</sup> *Phillipson v. Bates*, 2 Mo. 116; post, p. 774.

<sup>77</sup> *Bize v. Dickason*, 1 Term R. 285; *Citizens' Bank v. Grafflin*, 31 Md. 507; *Barber v. Brown*, 1 C. B. (N. S.) 121; *Milnes v. Duncan*, 6 Barn. & C. 671; *Mills v. Guardians of the Poor*, 3 Exch. 590; *Mayer v. City of New York*, 63 N. Y. 455; *Rheel v. Hicks*, 25 N. Y. 289; *Hazard v. Insurance Co.*, 7 R. I. 429; *Holtz v. Schmidt*, 59 N. Y. 253; *Clark v. Sylvester (Me.)* 13 Atl. Rep. 404; *McDonald v. Lynch*, 59 Mo. 350; *Glenn v. Shannon*, 12 S. C. 570.

<sup>78</sup> *Sharkey v. Mansfield*, 90 N. Y. 227. This distinction, for several reasons, may become important. Where there is no fraud, for instance, a demand before suit is necessary; but, where there is fraud (and it amounts to fraud if the other party knew of the mistake), demand is not necessary. *Sharkey v. Mansfield*, supra; *Taylor v. Spears*, 1 Eng. (Ark.) 381.

<sup>79</sup> *Dalls v. Lloyd*, 12 Q. B. 531; *Townsend v. Crowdy*, 8 C. B. (N. S.) 477; *Stuart v. Sears*, 119 Mass. 143; *Keenholts v. Church (Sup.)* 10 N. Y. Supp. 615.

because he thought he could not show that it was not due, or for any other reason, it cannot be recovered back. This is not ignorance of fact, but ignorance of the means of proving a fact.<sup>80</sup> The mere fact that the party paying the money suspects that it is not due does not bring the case within this rule. He must believe it is not due.<sup>81</sup> It is essential that there shall have been a mistake of a material fact. A voluntary payment with knowledge of all facts cannot be recovered, even though there may have been no obligation to pay.<sup>82</sup> By the weight of authority, if the mistake occurs and causes the payment, it is immaterial that it arose from negligence or want of diligent inquiry on the part of the plaintiff, or from forgetfulness, or the fact that he had the means of knowledge;<sup>83</sup> provided, however, the defendant has not so changed his position that he cannot be placed in statu quo.<sup>84</sup> If the money is intentionally paid "without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false," it cannot be recovered.<sup>85</sup>

<sup>80</sup> Keener, Quasi Cont. 26; Windbell v. Carroll, 16 Hun (N. Y.) 101.

<sup>81</sup> Keener, Quasi Cont. 28.

<sup>82</sup> Adams v. Reeves, 68 N. C. 134.

<sup>83</sup> Kelly v. Solari, 9 Mees. & W. 54; Appleton Bank v. McGilvray, 4 Gray (Mass.) 518; Devine v. Edwards, 101 Ill. 138; Lawrence v. Bank, 54 N. Y. 432; Bell v. Gardiner, 4 Man. & G. 11; Townsend v. Crowdy, 8 C. B. (N. S.) 477; Walte v. Leggett, 8 Cow. (N. Y.) 196; Kingston Bank v. Eltinge, 40 N. Y. 391; Brown v. Road Co., 56 Ind. 110; Rutherford v. McIvor, 21 Ala. 750; Baltimore & S. R. Co. v. Faunce, 6 Gill (Md.) 68; Koontz v. Bank, 51 Mo. 275; Walker v. Conant, 65 Mich. 194, 31 N. W. Rep. 786. Contra, Brummitt v. McGuire, 107 N. C. 351, 12 S. E. Rep. 191; Wilson v. Barker, 50 Me. 447.

<sup>84</sup> Keener, Quasi Cont. 71; Walker v. Conant, 65 Mich. 194, 31 N. W. Rep. 786.

<sup>85</sup> Kelly v. Solari, *supra*; McArthur v. Luce, 43 Mich. 435, 5 N. W. Rep. 451, Mowatt v. Wright, 1 Wend. (N. Y.) 355; Buffalo v. O'Malley, 61 Wis. 255, 20 N. W. Rep. 913; Bergenthal v. Flebrantz, 48 Wis. 435, 4 N. W. Rep. 89; Troy v. Bland, 58 Ala. 197. A compromise, therefore, cannot be repudiated, and money paid recovered, on the ground of mistake, where it was made without reference to the truth or falsity of facts. See cases above cited. But it is otherwise if there was mistake as to a fact which was believed to be true, and on the belief in the truth of which the compromise was made. Rheel v. Hicks, 25 N. Y. 289; Wheadon v. Olds, 20 Wend. (N. Y.) 174; Stuart v. Sears, 119 Mass. 143.

A person cannot recover money paid under a mistake of fact if he has received the equivalent for which he bargained, so that there is no failure of consideration; and it is immaterial that he need not, and would not, have made the payment if he had known the true state of facts. Where a bank, for instance, pays the check of a depositor under the erroneous belief that it has sufficient funds, it may recover from the payee the excess paid him over the amount to the depositor's credit, but it cannot recover the full amount paid. And it makes no difference that because of the overdraft it had a right to refuse to pay anything on the check.<sup>86</sup>

It is almost universally held that a payment under a mistake of law cannot be recovered, for no man can plead ignorance of the law. If a person, therefore, voluntarily pays a claim made upon him with full knowledge of all the circumstances, but under a mistake of law, he cannot recover the money paid on the ground that he was not legally liable, and could have successfully resisted the claim if he had understood his legal rights.<sup>87</sup> Mistake, therefore, of a fact, the truth or falsity of which is immaterial, does not entitle one to recover money paid. "A plaintiff paying a claim, supposing himself to be under an obligation to pay the same because of mistake as to a fact which, if true, would not have imposed an obligation upon him, cannot recover the money so paid in jurisdictions where a recovery is not allowed of money paid under mistake of law, since, had the plaintiff known the law, the fact about which

<sup>86</sup> Keener, *Quasi Cont.* 34, where the question is considered at length. And see *Merchants' Nat. Bank v. Bank*, 139 Mass. 513, 2 N. E. Rep. 513; *U. S. v. Badeau*, 130 U. S. 439, 9 Sup. Ct. Rep. 579; *Lemans v. Wiley*, 92 Ind. 436.

<sup>87</sup> *Bilbie v. Lumley*, 2 East, 469; *Vanderbeck v. City of Rochester*, 122 N. Y. 285, 25 N. E. Rep. 408; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Denby v. Moore*, 1 Barn. & Ald. 123; *Brisbane v. Dacres*, 5 Taunt. 143; *Wayne Co. v. Randall*, 43 Mich. 137, 5 N. W. Rep. 75; *Birkhauser v. Schmitt*, 45 Wis. 316; *Carson v. Cochran*, 52 Minn. 67, 53 N. W. Rep. 1130; *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 18 N. E. Rep. 486; *Beard v. Beard*, 25 W. Va. 486; *Porter v. Jefferies* (S. C.) 18 S. E. Rep. 229; *Mutual Sav. Inst. v. Enslin*, 46 Mo. 200; *Trigg v. Read*, 5 Humph. (Tenn.) 529; *Snelson v. State*, 16 Ind. 29; *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498; *Real Estate Sav. Inst. v. Linder*, 74 Pa. St. 371; *Townsend v. Cowles*, 31 Ala. 428; *Newell v. March*, 8 Ired. (N. C.) 441; *Christy v. Sullivan*, 50 Cal. 337; *Osburn v. Throckmorton* (Va.) 18 S. E. Rep. 285; ante, p. 305. Contra, *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. Rep. 313; ante, p. 305.

he was mistaken would not have induced him to make the payment."<sup>88</sup> We have, in treating of the formation of contract, shown the general exceptions to the rule that ignorance of law cannot be shown, and it will suffice to refer to what is there said.

*Same—Want or Failure of Consideration—Failure of Other Party to Perform.*

We may class with payments made under mistake payments which are allowed to be recovered because of want or failure of consideration, for in all cases where a recovery is allowed on this ground there has been a misapprehension. The party who has paid the money has not gotten what he supposed, or had a right to suppose, he was getting, or would get, in return for his money. Thus, where a person bought a bar of silver by weight, and, by an error in assaying it, paid for a greater weight than it contained, he was allowed to recover the excess from the seller as money received for his use.<sup>89</sup> It needs no argument to show that this is a case of mistake. In like manner, if the purchaser of goods has paid the price, and the seller fails to deliver the goods, the purchaser may recover the money paid as money received for his use.<sup>90</sup> And in any case where a person has paid money under an agreement which he is entitled to rescind, and does rescind, for want or failure of consideration, he may recover what he has paid.<sup>91</sup> The action will lie, for instance, against a person who sells goods as his own, but which are not his own, where the real owner subsequently claims them from the purchaser;<sup>92</sup> or against a person who sells bills, notes, bonds, stock, or other securities, which turn out to be forgeries, or for some other reason to be worthless;<sup>93</sup> or against a

<sup>88</sup> Keener, Quasi Cont. 32; citing *Needles v. Burk*, 81 Mo. 569; *Langevin v. City of St. Paul*, 49 Minn. 189, 51 N. W. Rep. 817; ante, p. 306.

<sup>89</sup> *Cox v. Prentice*, 3 Maule & S. 344. And see *Devine v. Edwards*, 101 Ill. 138; *Noyes v. Parker*, 64 Vt. 379, 24 Atl. Rep. 12.

<sup>90</sup> *Giles v. Edwards*, 7 Term R. 181; *Devaux v. Conolly*, 8 C. B. 640.

<sup>91</sup> *Clafin v. Godfrey*, 21 Pick. (Mass.) 1; *Newsome v. Graham*, 10 Barn. & C. 234; *Giles v. Edwards*, 7 Term R. 181; *Johnson v. Jennings*, 10 Grat. (Va.) 1; *Earle v. Bickford*, 6 Allen (Mass.) 549.

<sup>92</sup> *Elcholz v. Bannister*, 34 Law J. C. P. 105; ante, p. 205.

<sup>93</sup> *Clafin v. Godfrey*, supra; *Ripley v. Case*, 86 Mich. 261, 49 N. W. Rep. 46; *Westropp v. Solomon*, 8 C. B. 345; *Jones v. Ryde*, 5 Taunt. 488; *Gurney*

person who sells and attempts to convey land, where because of his want of title, or for other reasons, no title passes.<sup>84</sup>

As a rule, the failure of consideration must be total in order to entitle a person to recover money paid under a contract. If he has in fact received a part of the consideration, so that the failure of consideration is only partial, his remedy, if he has any, is for breach of the contract under which the money was paid.<sup>85</sup> This is in accord with the rule which we have heretofore stated,—that money paid under a mistake cannot be recovered if an equivalent has been received. Where a specific article is sold with a warranty of its quality, and is not altogether worthless, a mere breach of the warranty does not entitle the purchaser to recover the price paid. His remedy is by action for damages for breach of warranty.<sup>86</sup> Where the consideration is severable, however, so that the money paid for a portion of it may be ascertained, a partial failure may entitle the plaintiff to recover the part of the money paid in respect of that part of the consideration which has failed.<sup>87</sup>

A person can never recover money paid on the ground that the consideration has failed, if he has obtained the specific consideration which he bargained for, though it may turn out to be of no value;<sup>88</sup> as, for instance, where he has bought land or goods, intending to take his chances as to the seller's title, or where he has bought stock, bonds, or other property, and taken the chance of

v. Womersley, 4 El. & Bl. 133; *Watson v. Cresap*, 1 B. Mon. (Ky.) 195; *Young v. Cole*, 3 Bing. N. C. 724; *Burchfield v. Moore*, 3 El. & Bl. 683; *Moore v. Garwood*, 4 Exch. 681; *Wood v. Sheldon*, 42 N. J. Law, 421; ante, p. 205.

<sup>84</sup> *Cripps v. Reade*, 6 Term R. 606; *Schwinger v. Hickok*, 53 N. Y. 280; *Earle v. Bickford*, 6 Allen (Mass.) 549; *Wright v. Dickenson*, 67 Mich. 580. 35 N. W. Rep. 164. And see *McGoven v. Avery*, 37 Mich. 120; *Merryfield v. Willson*, 14 Tex. 224; ante, pp. 204, 205.

<sup>85</sup> *Hunt v. Silk*, 5 East, 783; *Rand v. Webber*, 64 Me. 191; *Blackburn v. Smith*, 2 Exch. 783; *Harnor v. Groves*, 15 C. B. 687; *Smart v. Gale*, 62 N. H. 62; ante, p. 206.

<sup>86</sup> *Gompertz v. Denton*, 1 Crompt. & M. 207.

<sup>87</sup> *Devaux v. Conolly*, 8 C. B. 640; *Goodspeed v. Fuller*, 46 Me. 141; *Lafin v. Howe*, 112 Ill. 253; ante, p. 206.

<sup>88</sup> *Westlake v. Adams*, 5 C. B. (N. S.) 266; *Taylor v. Hare*, 1 Bos. & P. (N. R.) 260; *Lambert v. Heath*, 15 Mees. & W. 486; ante, p. 206.



their being of value."<sup>99</sup> There must, as we have said, have been a misapprehension.

Where the failure of consideration was caused by the default of the plaintiff, he cannot recover the money paid for it.<sup>100</sup>

*Same—Money Paid under Illegal Contract.*

Though, as we have seen, no action will lie to enforce an illegal contract, an action will be allowed, under some circumstances, in disaffirmance of it. Ordinarily, where one of the parties has paid money under an illegal contract, he cannot sue to recover it back. The law will leave him where he has placed himself.<sup>101</sup> To this rule, as we have seen, there are some exceptions. Where the contract is still executory, except for a payment of money made by one of the parties to the other, and is not of such a character that the illegal object is effected by the mere payment, and is *malum prohibitum*, and not *malum in se*, there is a *locus poenitentiae*, and the party who has paid the money may withdraw from the contract, and recover what he has paid as money received for his use.<sup>102</sup> The law creates a quasi contractual obligation, on the part of the party who has received the money, to repay it. Another exception is where the parties are not in *pari delicto*. Where the party who has paid money under an illegal contract entered into the contract under the influence of fraud or strong pressure, or where the law which makes the contract unlawful was intended for his protection, he is not regarded as being in *pari delicto* with the other party, and may recover what he has paid.<sup>103</sup> Where a partner or other agent has received the profits of an illegal transaction, some courts have allowed the other partner or the principal to recover his share as money had and received for his

<sup>99</sup> *Morley v. Attenborough*, 3 Exch. 500; *Lambert v. Heath*, *supra*; *Westlake v. Adama*, *supra*.

<sup>100</sup> *Stray v. Russell*, 1 El. & El. 888, 916.

<sup>101</sup> *Holman v. Johnson*, 1 Cowp. 341; *Tuoro v. Cassin*, 1 Nott & McC. (S. O.) 173; *Waite v. Merrill*, 4 Greenl. (Me.) 102; *ante*, p. 491.

<sup>102</sup> *Ante*, p. 494; *Taylor v. Bowers* (Ct. App.) 1 Q. B. Div. 291; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. Rep. 356.

<sup>103</sup> *Ante*, p. 496.

use; but the weight of authority is to the contrary, most courts regarding this as being in effect to recognize and enforce the contract.<sup>104</sup>

### RECOVERY FOR BENEFITS CONFERRED.

318. Under certain circumstances, where one person has conferred upon another benefits in the way of property, services, etc., and cannot show a promise in fact by the latter to pay for them, the law will create a promise, because of the receipt of the benefits, to pay what they are reasonably worth.

It remains now for us to consider shortly the right of a person to recover for benefits which he has conferred upon another, where he is unable to show a promise in fact to pay for them. As we have seen, if a man delivers goods to another, or performs services for him, not under such circumstances as to lead the latter to believe them a gift, and the latter accepts them or acquiesces, a promise to pay for them will be implied as a fact. Here there is a true contract shown by the conduct of the parties. Goods may be delivered, however, or services rendered, under circumstances showing that there is no agreement in fact, or that, though there was an agreement, a condition has not been performed by one of the parties so as to entitle him to sue the other on it, or for some reason it is unenforceable, or is illegal. Under these circumstances the law will sometimes create a promise to pay for the goods delivered or services rendered.<sup>105</sup> There has, in these cases, been an agreement in fact, which for some reason will not support an action, and the goods have been delivered, or the services rendered, under this agreement. It needs no argument to show that you cannot imply as a fact any other promise to pay than the unenforceable promise proven to have been made. The question is one of evidence, and the promise shown to have been made in fact prevents the implica-

<sup>104</sup> Ante, p. 493, note 318.

<sup>105</sup> Van Deusen v. Blum, 18 Pick. (Mass.) 229; Turner v. Webster, 24 Kan. 38.

tion of any other promise in fact. Any implied promise to pay must be implied as a matter of law, or created by the law, and must therefore be quasi contractual, and not contractual. We cannot go at much length into the various circumstances under which such a promise will be created, but will mention some of the most important.

*Same—Liability for Necessaries.*

We have seen that, though an infant or an insane or drunken person is ordinarily incapable of making a contract which will bind him, he is liable for necessaries furnished him. He is not liable for what he may have agreed to pay for them, but only for what they are worth. It would seem from this that the promise is one created by law, and therefore quasi contractual.<sup>106</sup> To so regard it would make the law more consistent. It does not seem consistent to say that because of the immature judgment of an infant, or because of the diseased mind of a lunatic, he cannot consent, and therefore cannot enter into a binding agreement, and to say in the next breath that he may bind himself for necessaries. It is better to say that the law makes him liable for necessaries. As we have seen, however, many of the courts regard the liability as based upon the express promise. They allow an action, for instance, on a note, or other express promise, given for necessaries, provided it is such that the consideration may be inquired into, so that the recovery may be limited to what the necessaries are reasonably worth.<sup>107</sup>

We have also seen that, where a husband leaves his wife without means of support, the law gives her authority to pledge his credit to obtain necessaries. Not only is this true, but the law will hold a husband liable in assumpsit for necessaries furnished his abandoned wife while she is unconscious, and will hold an insane or infant husband liable for necessaries furnished his wife. The liability thus imposed upon the husband is imposed by law without

<sup>106</sup> Keener, Quasi Cont. 20; ante, p. 238; Rhodes v. Rhodes, 44 Ch. Div. 94; Sceva v. True, 53 N. H. 627; Trainer v. Trumbull, 141 Mass. 527, 6 N. E. Rep. 761; Gay v. Ballou, 4 Wend. (N. Y.) 403; Earle v. Reed, 10 Metc. (Mass.) 387.

<sup>107</sup> Ante, p. 238.

his consent, and is clearly quasi contractual.<sup>108</sup> Under like circumstances a man may be liable for necessities furnished his children.<sup>109</sup>

*Same—Forcing Benefit upon Another.*

Neither a liability *ex contractu* nor a liability quasi *ex contractu* can be imposed upon a person otherwise than by his act or consent. One man cannot force a benefit upon another without his knowledge or consent, and then compel him to pay for it.<sup>110</sup> If a person intentionally and knowingly performs services for another, or otherwise confers a benefit upon him, without his knowledge, so that he has no opportunity to refuse the benefit, the law will not create a liability to pay for it.<sup>111</sup> So, where a person supplies another with goods, the latter supposing that he is being supplied by another person with whom he has contracted for the goods, the law not only will not imply a promise in fact to pay for the goods, but it will not even create a promise.<sup>112</sup>

*Same—Benefits Rendered Gratuitously.*

If benefits are conferred gratuitously, the law will not create a promise to pay for them, even though they may have been requested.<sup>113</sup> A person, for instance, who has rendered services for another in the absence of any intention of charging for them on the

<sup>108</sup> Ante, p. 237; *Cunningham v. Beardon*, 98 Mass. 538; *Read v. Legard*, 6 Exch. 636; *Cantine v. Phillips*, 5 Har. (Del.) 428; *Price v. Sanders*, 60 Ind. 310; *Chapman v. Hughes*, 61 Miss. 339; *Chapple v. Cooper*, 13 Mees. & W. 252; *Turner v. Frisby*, 1 Strange, 168.

<sup>109</sup> *Gilley v. Gilley*, 79 Me. 292, 9 Atl. Rep. 623; *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480; *People v. Moores*, 4 Denio (N. Y.) 518; *In re Ryder*, 11 Paige (N. Y.) 185. But see *Kelly v. Davis*, 49 N. H. 176.

<sup>110</sup> Ante, pp. 511-514.

<sup>111</sup> *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Dunbar v. Williams*, 10 Johns. (N. Y.) 249; *Glenn v. Savage*, 14 Or. 567, 13 Pac. Rep. 442; *Earle v. Coburn*, 130 Mass. 596; *Shaw v. Graves*, 79 Me. 166, 8 Atl. Rep. 884.

<sup>112</sup> *Boston Ice Co. v. Potter*, 123 Mass. 28; *Schmaling v. Thomlinson*, 6 Taunt. 147.

<sup>113</sup> *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. Rep. 545; *Brown v. Tuttle*, 80 Me. 162, 13 Atl. Rep. 583; *Cicotte v. Church*, 60 Mich. 552, 27 N. W. Rep. 682; *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. Rep. 892; *Doyle v. Trinity Church*, 133 N. Y. 372, 31 N. E. Rep. 221; *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. Rep. 114; *Patterson v. Collar*, 31 Ill. App. 340; *Id.*, 137 Ill. 403, 27 N. E. Rep. 604; ante, p. 60.

one side, or of paying for them on the other, cannot afterwards recover for them. Where necessities are furnished to an infant, or an unconscious person, with the intention of charging for them, the law, as we have seen, will create a promise to pay their reasonable value. Where, however, there is no intention at the time to charge for the necessities furnished, the law will not create a liability.

*Same—Goods Wrongfully Obtained—Waiver of Tort.*

We have seen that, where goods are wrongfully obtained and converted into money, an action will lie by the owner to recover the money received as money received for his use. Such an action does not lie where the goods are retained by the wrongdoer, and not sold. As to whether, in such a case, the owner must sue in tort, as he may do, of course, or whether he may waive the tort, and sue in assumpsit for the value of the goods as upon a fictitious sale, the authorities are conflicting. Some courts allow such an action,<sup>114</sup> while others do not.<sup>115</sup>

*Same—Part Performance of Contract.*

As we have seen in treating of discharge of contract by breach, a party to a contract is not discharged from liability to perform by the failure of the other party to perform a part of his promise which is merely subsidiary, and does not go to the essence of the contract; nor, where a contract consists of several promises based on several considerations, so that the promises are divisible, does a failure to perform one or more discharge the other party from

<sup>114</sup> Russell v. Bell, 10 Mees. & W. 340; Wilson v. Force, 6 Johns. (N. Y.) 110; Toledo W. & W. R. Co. v. Chew, 67 Ill. 378; Aldine Manuf'g Co. v. Barnard, 84 Mich. 632, 28 N. W. Rep. 280; Goodwin v. Griffin, 88 N. Y. 629; Walker v. Duncan, 68 Wis. 624, 32 N. W. Rep. 680; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. Rep. 161; Blalock v. Phillips, 38 Ga. 216; Dietz v. Sutcliffe, 80 Ky. 650; Morford v. White, 53 Ind. 547; Newton Manuf'g Co. v. White, 53 Ga. 395; Evans v. Miller, 58 Miss. 120; Logan v. Wallis, 76 N. C. 416.

<sup>115</sup> Jones v. Hoar, 5 Pick. (Mass.) 285; Allen v. Ford, 19 Pick. (Mass.) 217; Androscoggin Water-Power Co. v. Metcalf, 65 Me. 40; Bethlehem Borough v. Insurance Co., 81 Pa. St. 445; Sandeen v. Railroad Co., 79 Mo. 278; Galloway v. Holmes, 1 Doug. (Mich.) 330 (but see Aldine Manuf'g Co. v. Barnard, supra); Winchell v. Noyes, 23 Vt. 303; Strother v. Butler, 17 Ala. 733; Ferguson v. Carrington, 9 Barn. & C. 59. But see Russell v. Bell, supra.

liability to pay for those that have been performed. In these cases the party thus partially in default may recover for what he has done, leaving the other party to recover damages from him for his partial breach. The recovery is on the contract itself. Where, however, the breach is not merely of a subsidiary promise, or of one or more of several promises, but of a term which the parties regarded as of the essence of the contract, or there is a failure to fully perform an indivisible promise, the question arises whether the other party is liable for the benefits he has received from the partial performance. That he is not liable on the contract itself is clear, for he can only recover on it by showing that he has substantially performed what he has agreed to perform as a condition precedent to the other's liability. The other party has not agreed to pay him for a partial performance, and any liability must be created by the law without agreement, or quasi ex contractu.

Under certain circumstances such a liability is created. The right to recover is based, not on principles of the law of contract, but on equitable principles; and it would be beyond the scope of our work to go into the subject at any length. It must suffice to call attention to a few of the most important cases in which such a recovery has been allowed. Where a person has willfully refused or failed to fully perform a contract which he was bound to perform, it is clear that he should not, and cannot, recover, for what he has performed under it.<sup>116</sup> If his default was not willful, but because of sickness, death, prevention by the other party, or any other cause, not arising from his own fault, and excusing the

<sup>116</sup> *Stark v. Parker*, 2 Pick. (Mass.) 267; *Lantry v. Parks*, 8 Cow. (N. Y.) 63; *Thrift v. Payne*, 71 Ill. 408; *Moritz v. Larsen*, 70 Wis. 569, 36 N. W. Rep. 331; *Peterson v. Mayer*, 46 Minn. 468, 49 N. W. Rep. 245; *Hapgood v. Shaw*, 105 Mass. 276; *Catlin v. Tobias*, 26 N. Y. 217; *Champlin v. Rowley*, 18 Wend. (N. Y.) 187; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Stark v. Parker*, 2 Pick. (Mass.) 267; *Thrift v. Payne*, 71 Ill. 408; *Hansell v. Erickson*, 28 Ill. 267; *Miller v. Goddard*, 34 Me. 102; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, 16 Atl. Rep. 36; *Scheible v. Klein*, 89 Mich. 376, 50 N. W. Rep. 857; *Gill v. Vogler*, 52 Md. 663; *Kruger v. Leppel*, 42 Minn. 6, 43 N. W. Rep. 484; note 124, *infra*. Contra, *Britton v. Turner*, 6 N. H. 481; *Chamblee v. Baker*, 95 N. C. 98; *Patnote v. Sanders*, 41 Vt. 66; *McClay v. Hedge*, 18 Iowa, 66. If the other party acquiesces in the breach of contract, he is liable on the quantum meruit for the part performance. *Dermott v. Jones*, 23 How. 220.

breach, then he can recover from the other party on a promise created by the law to pay for the benefits he has received from the part performance.<sup>117</sup> And, by the weight of authority, where one of the parties to a contract has endeavored in good faith to perform it, and has substantially done so, and thereby conferred a substantial benefit on the other party, though he has failed to perform the contract in some particulars, he may recover what the partial performance is reasonably worth, having regard, however, to the contract price.<sup>118</sup>

If, by the express terms of the contract, there is no liability except upon a full performance, there can be no recovery for a part performance, even where the contract is divisible, and a full performance is prevented by death or other cause beyond the control of the parties. The terms of the express contract exclude the arising of any such implied contract as could form the basis of a claim upon a quantum meruit.<sup>119</sup>

<sup>117</sup> *Wolfe v. Howes*, 20 N. Y. 197; *Robinson v. Davison*, L. R. 6 Exch. 269; *Boast v. Firth*, L. R. 4 C. P. 1; *Spalding v. Rosa*, 71 N. Y. 40; *Jones v. Judd*, 4 N. Y. 412; *Lakeman v. Pollard*, 43 Me. 463; *Green v. Gilbert*, 21 Wis. 395; *Clark v. Gilbert*, 26 N. Y. 279; *Martus v. Houck*, 39 Mich. 431; *Jennings v. Lyons*, 39 Wis. 553; *Pinches v. Lutheran Church*, 55 Conn. 183, 10 Atl. Rep. 264; *Shultz v. Johnson*, 5 B. Mon. (Ky.) 497; *Adams v. Crosby*, 48 Ind. 153; *Harrington v. Iron-Works Co.*, 119 Mass. 82; *Stewart v. Loring*, 5 Allen (Mass.) 306; *Fuller v. Brown*, 11 Metc. (Mass.) 440; *Hayward v. Leonard*, 7 Pick. (Mass.) 181; *Scully v. Kirkpatrick*, 79 Pa. St. 324; *Allen v. Baker*, 86 N. C. 91; *Gilman v. Hall*, 11 Vt. 510; *Fenton v. Clark*, Id. 557; *Hubbard v. Belden*, 27 Vt. 645; *Yerrington v. Green*, 7 R. I. 589; *Norris v. School Dist.*, 12 Me. 293; *Wadleigh v. Town of Sutton*, 6 N. H. 15; *Mooney v. Iron Co.*, 82 Mich. 263, 46 N. W. Rep. 376; ante, p. 678.

<sup>118</sup> *Hayward v. Leonard*, 7 Pick. (Mass.) 181; *Blood v. Wilson*, 141 Mass. 25, 6 N. E. Rep. 362; *Bragg v. Town of Bradford*, 33 Vt. 35; *Pinches v. Lutheran Church*, 55 Conn. 183, 10 Atl. Rep. 264; *Dermott v. Jones*, 23 How. 220; *McMillan v. Malloy*, 10 Neb. 228, 4 N. W. Rep. 1004; *Corwin v. Wallace*, 17 Iowa, 374; *White v. Oliver*, 36 Me. 92; *Blakeslee v. Holt*, 42 Conn. 226; *Lucas v. Godwin*, 3 Bing. N. C. 773; *Parker v. Steed*, 1 Lea (Tenn.) 206; *Taylor v. Williams*, 6 Wis. 363. Contra, *Smith v. Brady*, 17 N. Y. 173; *Catlin v. Tobias*, 26 N. Y. 217; *Champlin v. Rowley*, 18 Wend. (N. Y.) 187; *Bosarth v. Dudley*, 44 N. J. Law, 304; *Miller v. Phillips*, 31 Pa. St. 218; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. Rep. 845.

<sup>119</sup> *Cutter v. Powell*, 6 Term R. 320.

*Same—Retaining Benefits.*

Where benefits are conferred by one person on another under such circumstances as to raise no promise in fact or in law to pay for them, he may nevertheless become liable by retaining them. If a person, for instance, were to receive goods from another, reasonably but mistakenly believing them to be intended as a gift, and, after learning of his mistake, should retain them, when he might return them, or, by the weight of authority, if he should receive part of the goods purchased from another, and retain them after failure of the latter to supply the rest of the goods, the law would compel him to pay for them.<sup>120</sup> And the same rule would apply where benefits are in any other way received under such circumstances as to create no contractual obligation, and are retained when they should in justice be returned. If, however, the benefits thus received are incapable of being returned, as where they consist of services, or of goods which have been consumed before the duty to return them has arisen or is known, or of material which has been used in repairing a house, it would seem that no liability should be created.<sup>121</sup> These benefits cannot be returned, and, if there was no fault in receiving them, to create a liability to pay for them would seem to be forcing a benefit upon the recipient. If a man engages a servant for a specified time, and agrees to pay him if he works for that time, his rendition of the services is a condition precedent to his right to recover for them on the contract. If he leaves his employer's service, without excuse, before the time has expired, he certainly cannot recover on the contract without a violation of the plainest principles of the law of contract. The master cannot return the benefit he has received from the part performance, and he should not be held liable to pay for it. It is the servant's fault that he has not performed his contract, and no

<sup>120</sup> *Shipton v. Casson*, 5 Barn. & C. 378; *Oxendale v. Wetherell*, 9 Barn. & C. 386; *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. Rep. 367. But see, contra, *Catlin v. Tobias*, 26 N. Y. 217; ante, p. 662, note 142. By the weight of authority, this does not apply where the refusal to fully perform a contract is willful. Ante, p. 781.

<sup>121</sup> *Smith v. Brady*, 17 N. Y. 173; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. Rep. 845.



equitable rule would be infringed by requiring him to suffer the loss of his part performance. Some courts allow the servant to recover on the quantum meruit, though he has broken his contract without excuse. The weight of authority, however, is to the contrary.

*Same—Part Performance of Illegal Contract.*

Difficult questions have arisen where it has been sought to recover for benefits conferred under an illegal contract. We have already seen that an action for money had and received will lie to recover money paid under an illegal contract which has not been carried out, provided the illegal object has not been effected by the mere payment of the money, and provided the object is *malum prohibitum*, and not *malum in se*. We have also seen that in certain cases the parties to an illegal contract are not regarded as being in *pari delicto*, and that the person who is the less guilty is allowed to recover what he has paid under the contract. So, also, where a person has performed services under an illegal contract, and he is not in *pari delicto* with the other party, he may be allowed to recover what the services are worth. Where an illegal contract has been performed, and the illegal object effected, neither party, if he knew of the illegality, can recover for the benefits conferred upon the other.

*Same—Part Performance of Unenforceable or Void Agreement.*

Where an agreement is not illegal, but merely void, or unenforceable, and one of the parties refuses to perform his promise after performance or part performance by the other, the law will create a promise to pay for the benefits received. If a man delivers goods, or conveys land, or renders services for another under a contract which is void or unenforceable, but not illegal, he may recover on the quantum valebant or quantum meruit.<sup>122</sup> Such is the case with

<sup>122</sup> *Nugent v. Teachout*, 67 Mich. 571, 35 N. W. Rep. 254; *Whipple v. Parker*, 29 Mich. 309; *Patten v. Hicks*, 43 Cal. 509; *Rebman v. Water Co.*, 95 Cal. 390, 30 Pac. Rep. 564; *Cadman v. Markle*, 76 Mich. 448, 43 N. W. Rep. 315; *Fillis v. Cory*, 74 Wis. 176, 42 N. W. Rep. 252; *Steven's Ex'rs v. Lee*, 70 Tex. 279, 8 S. W. Rep. 40; *Lapham v. Osborne*, 20 Nev. 168, 18 Pac. Rep. 881; *Schoonover v. Vachon*, 121 Ind. 3, 22 N. E. Rep. 777; *Miller v. Eldredge*,

contracts which are unenforceable because of noncompliance with the statute of frauds.<sup>123</sup>

A party, however, who has partly performed a contract which is merely unenforceable and not illegal, cannot, by the weight of authority, abandon it, and recover for the part performance, if the other party is willing to carry out the contract.<sup>124</sup>

*Same—On Rescission of Contract.*

As we have seen, if a person has obtained money from another under an agreement which the latter has the right to rescind on the ground of fraud, duress, or undue influence, or on the ground of want or failure of consideration, or want of capacity to contract, or because of a breach of his contract by the other operating as a discharge, he may, on rescinding the contract, recover the amount paid as money received for his use.<sup>125</sup> So, by the weight of authority, where a person, for like reasons, rescinds a contract which he has partly performed by the rendition of services, he may recover for the services on a promise created by law because of their receipt and the benefit conferred.<sup>126</sup> It would likewise seem that

123 Ind. 461, 27 N. E. Rep. 132; Koch v. Williams (Wis.) 52 N. W. Rep. 257; Smith v. Wooding, 20 Ala. 324; Walker v. Shackelford, 49 Ark. 503, 5 S. W. Rep. 887; Baker v. Lauterbach, 68 Md. 64, 11 Atl. Rep. 704; McGinnis v. Fernandes, 126 Ill. 228, 19 N. E. Rep. 44; Little v. Martin, 3 Wend. (N. Y.) 219; Montague v. Garnett, 3 Bush (Ky.) 297; Wonsettler v. Lee, 40 Kan. 367, 19 Pac. Rep. 862; Taggart v. Tevanny, 1 Ind. App. 339, 27 N. E. Rep. 511; ante, p. 134.

<sup>123</sup> See cases above cited.

<sup>124</sup> Philbrook v. Belknap, 6 Vt. 383; Galway v. Shields, 66 Mo. 313; Ketchum v. Everton, 13 Johns. (N. Y.) 359; Collier v. Coates, 17 Barb. (N. Y.) 473; Greton v. Smith, 33 N. Y. 245; Nelson v. Shelby Manuf'g & Imp. Co., 96 Ala. 515, 11 South. Rep. 695; McKinney v. Harvie, 38 Minn. 18, 35 N. W. Rep. 668; Sennett v. Shehan, 27 Minn. 328, 7 N. W. Rep. 266; Kriger v. Leppel, 42 Minn. 6, 43 N. W. Rep. 484; Sims v. Hutchins, 8 Smedes & M. (Miss.) 331; Abbott v. Inskip, 29 Ohio St. 59; Shaw v. Shaw, 6 Vt. 69; Plummer v. Bucknam, 55 Me. 105; Clark v. Terry, 25 Conn. 395; Hawley v. Moody, 24 Vt. 605; ante, p. 129. Contra, King v. Welcome, 5 Gray (Mass.) 41 (but see Riley v. Williams, 123 Mass. 506); Koch v. Williams (Wis.) 52 N. W. Rep. 257.

<sup>125</sup> Ante, p. 764.

<sup>126</sup> Palanché v. Colburn, 8 Bing. 14; Ex parte Maclure, L. R. 5 Ch. App. 737; Seipel v. Insurance Co., 84 Pa. St. 47; Gaffney v. Hayden, 110 Mass. 137;

a recovery should be allowed on the quantum valebant for goods delivered under a contract which is afterwards rescinded, and many of the courts have allowed such a recovery. As we have seen, however, there is a conflict of opinion on this point.<sup>127</sup>

The existence of the special contract in these cases which has been rescinded precludes the implication of any other contract in fact. The obligation, therefore, is necessarily imposed by law.

*Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Williams v. Bemis*, 108 Mass. 91; *Brown v. Railway Co.*, 36 Minn. 236, 31 N. W. Rep. 941; *Shane v. Smith*, 37 Kan. 55, 14 Pac. Rep. 477; ante, p. 259.

<sup>127</sup> Ante, p. 780.

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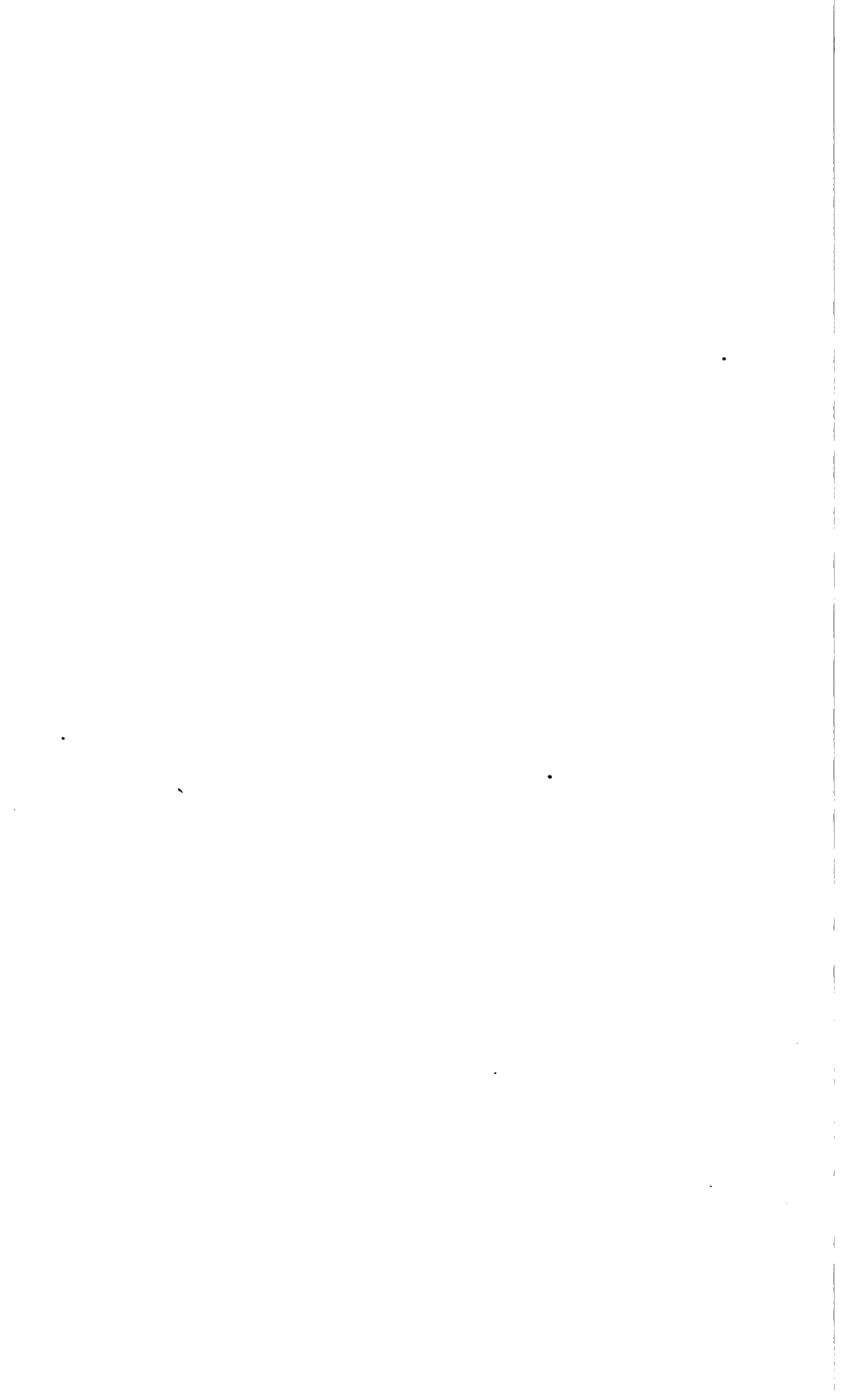
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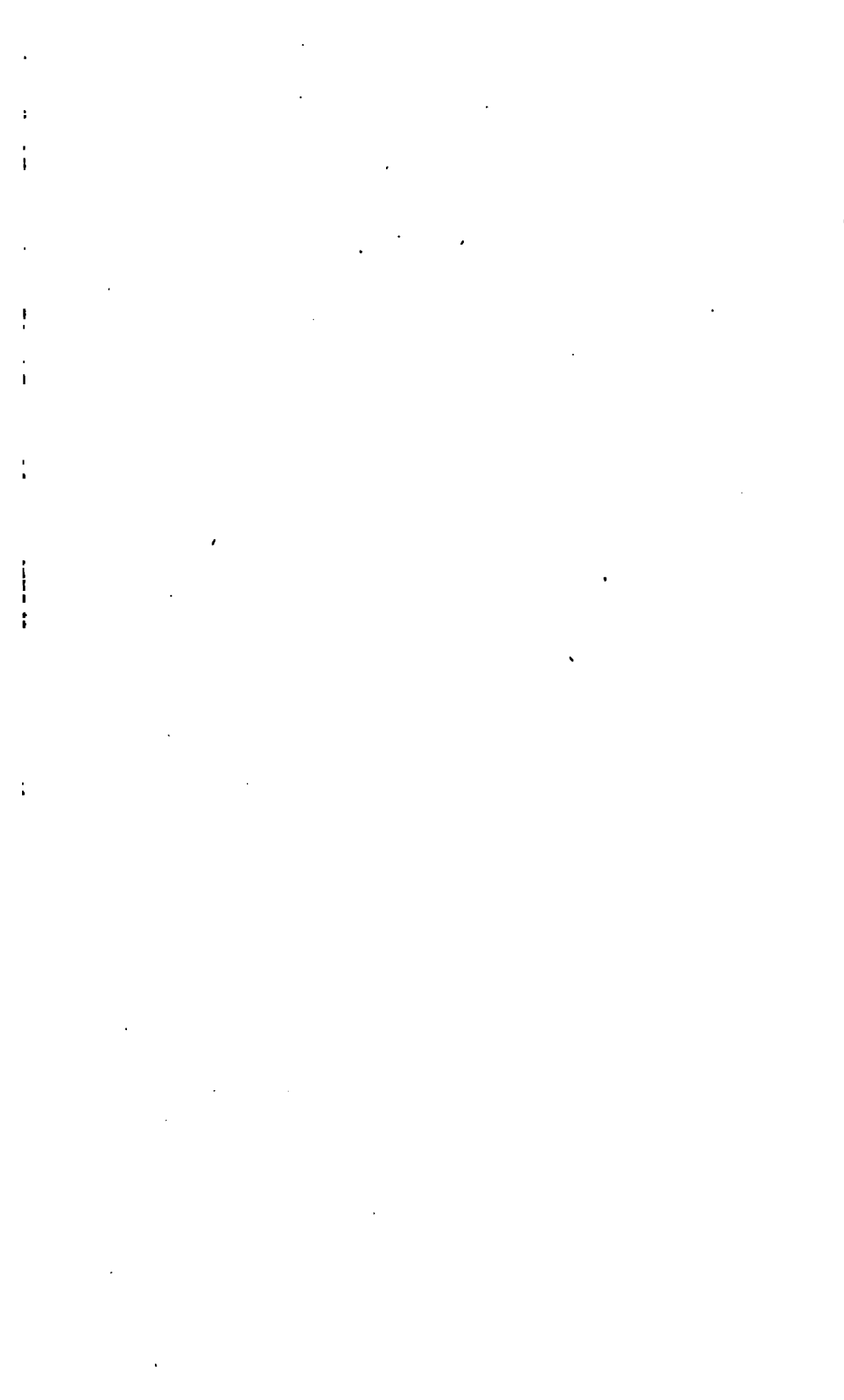














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